IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Appellant/Cross-Appellee,

v. CASE NO. 84,977

DONALD GUNSBY,

Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT, IN AND FOR
MARION COUNTY, FLORIDA

INITIAL BRIEF AND APPENDIX OF APPELLEE/CROSS-APPELLANT

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STATEMENT OF THE CASE

The defendant adopts the state's Statement of the Case, with the following additions. In the December 20, 1994, Order, the circuit court denied Mr. Gunsby's motion for a new guilt/innocence trial. The defense gave notice of appeal from this denial on January 18, 1995. PCR 3571.[1] Also, pursuant to unopposed motion, on July 12, 1995, this Court ordered that the parties may rely upon the original appellate record (Case No. 73,616) in addition to the post-conviction proceeding record.

STATEMENT OF FACTS REGARDING THE PENALTY PHASE

I. EVIDENCE REGARDING JURY SELECTION

At Mr. Gunsby's original trial the court began jury selection with a brief introduction to the jury pool including a general description of the charges. OGT 4-5. Thirteen prospective jurors were then selected and sworn. At this point, the trial court mentioned that if the defendant were convicted, the selected jury would be required to make a recommendation for life imprisonment or the death penalty.

The trial court then asked about any generic concerns:

> Q: Given the nature of this case do any of you feel that it would be better if you did not serve on this particular case?

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[1] Original Guilt Transcript ("OGT") refers to the transcript of the guilt phase of Mr. Gunsby's trial on November 8-9, 1988. Original Penalty Transcript (OPT") refers to the transcript of the penalty phase of Mr. Gunsby's trial on December 13, 1988. Post-Conviction Transcript ("PCT") refers to the transcript of the Rule 3.850 hearing on March 14-17, 1994, which begins at Vol. XXII of the Post-Conviction Record, which is abbreviated "PCR." Exhibits used during the 3.850 hearing will be referenced as "Def.'s Ex. __" and "State's Ex. __".

OGT 11. Prospective jurors Michael and Durchak answered affirmatively and were excused without another inquiry from the trial court or a word from Mr. Gunsby's trial counsel, Edward Scott.[2] *Id.*

After two new prospective jurors were sworn, the trial court asked:

> Q: Now, I need to know whether any of you have such strong feelings for or against the death penalty that would prevent you from being fair and impartial to both the state and to the defense. Is there anyone that feels that way, either for or against?

OGT 12. Prospective jurors Cooper, Dix and Rice were then excused without questions or objection from Mr. Scott. OGT 12-13. After three new jurors were sworn, the trial court excused juror Trina Howell after she responded affirmatively to the trial court's question:

> Q: Do any of you three feel that just because of the nature of this case it would be better if you did not serve?

OGT 13. Prospective juror Nelson was sworn and then immediately excused when she answered "no" to the trial court's general inquiry. OGT 13-14 ("Do you feel you can serve on this particular case, ma'am?"). In sum, the trial court excused seven prospective jurors--Michael, Durchak, Cooper, Dix, Rice, Howell and Nelson--for cause without a single question or objection from Mr. Scott.

II. EVIDENCE REGARDING AGGRAVATING FACTORS RELIED UPON BY THE STATE

A. Trial

To establish the aggravating factors related to Mr. Gunsby's crime, the state introduced testimony from two witnesses and various exhibits. Court reporter K. Joann Lewis testified that on March 4, 1988, one month before the murder of Hesham Awadallah, Mr. Gunsby

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[2] Mr. Scott was later to reveal that he was about a year out of law school at the time of the trial. PCT 256.

testified that he pled guilty to possession of a shotgun in a vehicle. He was found guilty of that crime by the Court, and was sentenced to 18 months in prison. OPT 7-8. Ralph D. Ming of the Marion County Sheriff's Office testified that although Mr. Gunsby had been sentenced to 18 months in prison, and was to report to the Marion County Jail on March 9, 1998, he never reported to the jail to serve his sentence. OPT 11-14.

Although the state introduced three certified prior convictions of Mr. Gunsby, the prosecutor repeatedly misinformed the jury concerning the nature of the convictions. For example, while State's Exhibit 12A depicted a 1967 conviction of aggravated assault, on three separate occasions the prosecutor misinformed the jury that this conviction was actually for assault with intent to commit murder. On two of those occasions the prosecutor said that the conviction was for an armed offense. OPT 5; 128; Def.'s Ex. 80, App. at 89. Further, while State's Ex. 12C depicted a 1971 conviction for robbery, on three separate occasions the prosecutor misinformed the jury that the conviction was actually for robbery and possession of a firearm during a felony. OPT 5; 127-128; Def.'s Ex. 80, App. at 103.

The state also introduced Ex. 12b to show that Mr. Gunsby was under sentence of imprisonment at the time of the instant offense. The exhibit revealed that the offense for which Mr. Gunsby was under sentence of imprisonment was possession of a firearm by a felon and carrying a concealed firearm, specially a shotgun. OPT 5; 7-8; 12; 126; 128; Def.'s Ex. 80, App. at 94. Even though no evidence was presented about the shotgun, the prosecutor misinformed the jury that it was "filed off". OPT 28.

Although the prosecutor's argument was false and improper and severely prejudiced Mr. Gunsby's penalty phase proceedings, Mr. Gunsby's trial counsel did not object to the misstatements about the prior convictions, did not object to the misstatement about the shotgun being filed off, and did not object to the introduction of evidence regarding the offense to which Mr. Gunsby was under sentence of imprisonment. PCT 313.

B. 3.850 Hearing

At the 3.850 hearing, Dr. Steven Penrod, one of the nation's foremost experts on jury behavior[3]***, testified regarding his extensive research to determine the prejudicial impact of the prosecution's misstatements on the jury. Dr. Penrod testified that he conducted simulation experiments to determine whether the jury would have been able to figure out Mr. Gunsby's prior convictions (aggravated assault and robbery, rather than attempt to commit murder with a deadly weapon and robbery while in possession of a firearm) by looking at the documentary exhibits which contained the correct information rather than relying on the misstatements made by the prosecution, in the face of an instruction from the Court that correctly characterized Mr. Gunsby's convictions. PCT 564-65.[4]

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[3] Dr. Penrod is a professor of law at the University of Minnesota. In addition to a law degree, Dr. Penrod also has a Ph.D. in Psychology. His areas of specialization are jury decision-making, factors affecting eyewitness reliability, and the effects of media on behavior. He has written and spoken widely in the field of jury behavior and jury comprehension. PCT 562-63.

[4] The Court provided Mr. Gunsby's jury with the following instruction: "The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence: "One, the crime for which the Defendant is to be sentenced was committed while he was under sentence of imprisonment. Two, the Defendant had been previously convicted of another capital offense or of a felony involving the use of threat of violence to some

Dr. Penrod testified that it was his initial opinion that it was very unlikely that the jury would have been able to figure out Mr. Gunsby's actual convictions. PCT 565-66; 572. He believed that the statements of the prosecution would be considered "persuasive communications" by the jury. A persuasive communication is an assertion that is made by an authority figure who is articulate and has an expertise in the area being addressed. PCT 566. Dr. Penrod explained that the instruction given by the court would not have been likely to correct the misstatements made by the prosecutor at the beginning and the end of the hearing. PCT 570. While the instruction accurately characterized Mr. Gunsby's convictions, it did not alert the jury that the prosecution had misstated Mr. Gunsby's convictions and that those misstatements should not be used in decision-making. PCT 570-71.

Dr. Penrod designed a study to test whether or not his initial opinion was correct. He recreated the sentencing hearing before five "mock" juries made up of jury-eligible individuals residing in Marion County. PCT 572-73. The mock juries viewed a videotape that contained a factual summary of the crime taken directly from the Florida Supreme Court opinion in this case, followed by a re-enactment of the penalty phase hearing. PCT 573-74; 584-85. The individual juries were then given exhibits regarding Mr. Gunsby's prior convictions and sent into separate rooms to deliberate for fifty-five minutes, the time taken by the original jury. Their deliberations were videotaped. PCT 581-83.

Dr. Penrod testified that based on his review of the videotapes,

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person. The crimes of robbery and aggravated assault are felonies involving the use of threat of violence to another person." OPT 149-50.

his review of the jury questionnaires, and his analysis of the data compiled and accumulated from the questionnaires, there was no evidence whatsoever that even a single person on any of the five mock juries was able to figure out Mr. Gunsby's true criminal record by looking at the actual exhibits or listening to the judge's instruction. In fact, there was extensive evidence to the contrary. PCT 591. Some jurors made the same incorrect assertions as the prosecution about Mr. Gunsby's prior record while actually reading from the documents. PCT 593-94.

Ed Scott

Mr. Scott testified that there was no tactical reason for allowing the misstatements to stand uncorrected, nor any excuse for his not knowing the defendant's prior record or at least looking at the documents to which he had stipulated. He further acknowledged that there was no tactical reason for failing to object to the state's presentation of inaccurate non-statutory aggravating evidence about the nature of the offense for which Mr. Gunsby was under sentence of imprisonment. PCT 312-13.

During the 3.850 hearing, the state did not contest the fact of the prosecutor's improper statements or the lack of evidence about the filed-off status of the shotgun.

III. EVIDENCE REGARDING MR. GUNSBY'S BACKGROUND

A. Trial

During the penalty phase of Mr. Gunsby's original trial, Mr. Scott called only three witnesses to provide mitigation testimony concerning Mr. Gunsby's background: Mr. Gunsby's neighbors Annabell Raines and Eartha Harris and his aunt, Johnnie Mae Gunsby.

Ms. Raines testified that Mr. Gunsby would "run off" the drug dealers and drug users that would loiter around the Parkside Garden apartment complex where they lived. Both Ms. Raines and Ms. Harris testified that Mr. Gunsby was very fond of children. OPT 37-39; 43-45.

Johnnie Mae Gunsby testified that she had virtually raised Mr. Gunsby due to his mother's retardation, epilepsy and eventual institutionalization. OPT 109-10. She testified that Mr. Gunsby suffered from mental problems and was unable to function in school. OPT 111-13. Ms. Gunsby also testified about her nephew's employment at the Parkside Garden apartment complex and his attempts to drive away the drug users that congregated there. OPT 114-16.

B. 3.850 Hearing

During the 3.850 hearing, 13 witnesses provided testimony concerning the mitigating circumstances of Mr. Gunsby's background. These witnesses included several members of Mr. Gunsby's family, a former teacher, former employers, and former neighbors from Jasper, Florida, the town where Mr. Gunsby was born. They were selected to testify from among the 23 individuals who submitted mitigation evidence by affidavit in support of the 3.850 motion. Through the testimony of these witnesses, the following mitigation evidence emerged regarding Mr. Gunsby's life and was uncontested by the state:

Donald Gunsby's mother, Louise, and aunt never knew their father, and their mother died when Donald's mother was nine years old. They had to be taken in by neighbors, the Rollins family, who had nine other children to care for besides Louise and Johnnie Mae Jones. PCT 450-452; 702; 719; 1024-25. Donald was born without anyone knowing who his father was because neighborhood men would frequently have sex with his mother when her sister was out. No one knew that Don's mother was

pregnant until her stomach swelled to significant proportions. There are no written records substantiating Mr. Gunsby's birth.[5] He was born in a shack with no running water or electricity and no medical personnel present. PCT 457; 505; 700-01; 706-07; 724; 738-39; 1019-10; 1014; Def.'s Ex. 84.

Donald Gunsby's mother was inflicted with severe physical ailments, and she was thought to be mentally retarded and unable to care for herself. PCT 452; 457-61; 703-04; 721; 726; 1011; Def.'s Exs. 84, 95. Between his mother's incapacity and absence and his aunt's extra-marital affairs and drinking, the Mr. Gunsby had no one to raise him properly. Those who knew Donald from an early age knew that Louise Jones' children would not be normal and faced little hope for a productive or useful life. PCT 540-42; 687-88; 691-92; 708-10; 725-27; 730; 1014; 1026-27.

Mr. Gunsby was born and reared in an environment permeated with racial discrimination and violence; this environment especially affected Donald's mother, who was totally incapacitated, and Donald and his brother, who had no opportunity to obtain care and attention. PCT 679-81; 700-01; 736-37; 740; 1009-13.

By the time she moved to Ocala in 1956, Mr. Gunsby's mother was institutionalized and his aunt had five children plus Donald and his brother to care for without the help of her husband. PCT 461-63.

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[5] Donald Gunsby's brother, Jimmy Jones, was shot to death on July 15, 1993. *See* Def.'s Ex. 73, Death Certificate of Jimmy Jones. Accordingly, the Affidavit of Jimmy Jones, Def.'s Ex. 84, was admitted into evidence for the purposes of the evidentiary hearing. The exclusionary rules of evidence, including the rule barring use of hearsay statements, are inapplicable in the penalty phase of a capital trial. *See* Fla. Stat. ch. 921.141(1) (1994); *see also Garcia v. State*, 622 So. 2d 1325 (Fla. 1993).

Donald Gunsby was developmentally delayed in every respect and has always acted like a child, even as an adult. He was teased, humiliated and taken advantage of because of his appearance and retardation. PCT 468-69; 472; 503; 521; 523; 532; 542-43; 548; Def.'s Ex. 84 at ¶ 9. Donald's retardation made it virtually impossible to read and write, and he experienced headaches and strange sleep habits. PCT 467-70; 483; 540-41.

As a child, some of Mr. Gunsby's cousins resented him, and he was treated differently from the other children in the family. He dropped out of school after the third grade, and his years in school up until third grade were virtually useless. PCT 469; 484; 501; 503; 535-38; 634-636; Def.'s Ex. 54, App. at 35.

Donald Gunsby's childhood was characterized by an extremely abusive family environment, filled with violence, heavy drinking, bootlegging and a host of men who were anything but father figures to the Gunsby children. PCT 462-66; 493; 495-99; 529-32; 542; 545-47; 683-84; 1012; Def.'s Ex. 84 ¶13. Hunger was a way of life, and the children were forced to steal for food. They frequently missed school to pick in the fields so that there would be food on the table. PCT 494; 499-500; 537-38; 543-45.

Violence has abounded wherever Donald Gunsby has lived, characterized by shootings, drug activity, prostitution, and other forms of crime. PCT 475-76; 489-93; 509-10; 526; 528-29; 740. When Donald was not in the harsh and violent Ocala setting, he experienced equally harsh and abusive institutional experiences at the Dozier School for Boys and at the Florida State Prison. *See* Def.'s Ex. 88d, Order on Preliminary Injunction, *Bobby M. v. Robert Graham*, No. TCA-83-

7003, United States District Court, Northern District of Florida, July 14, 1983). PCT 506-08; 539.

Virtually all of Donald's eight siblings/cousins have had problems with drugs, alcohol, or suicide attempts. Donald Gunsby is no exception; he was a heavy drinker by 11 or 12 years of age. PCT 475; 477; 504-05; 549; 559; Def.'s Ex. 84 at ¶ 11-12 and 14-16. He was also the protector and provider for his siblings from a very early age. PCT 474-75; 494; 503-04; 509.

Donald Gunsby was a hard, reliable worker, who got along well with his supervisors and always performed more than his share of the work. PCT 515-16; 520. The defendant made positive contributions to his community when he lived at Parkside Gardens prior to his arrest. PCT 477-78; 485; 550-52.

Ed Scott

Mr. Scott testified that most of his investigation and pretrial work was directed toward guilt/innocence issues rather than the penalty phase issues. The extent of his penalty phase preparation was talking to immediate family members in Ocala.[6] He had no tactical reason for failing to develop further evidence about her institutionalization and her history of epileptic seizures. PCT 284-85. Mr. Scott testified that there was no tactical reason for not going to Jasper to investigate Mr. Gunsby's birth, childhood or upbringing. PCT 283-84;

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[6] The record reflects that Mr. Scott devoted 11.9 hours to the penalty phase, 4.5 hours of which were spent on "legal research regarding the death penalty." *See* Def.'s Ex. 69, Scott Fee Petition, App. at 46. Mr. Scott's fee petition does not indicate the division of time between guilt/innocence issues and penalty phase issues, so it is unclear whether other time entries are devoted to preparation for the penalty phase. However, even a liberal reading of all of Mr. Scott's time entries from August, 1988 until the actual date of the penalty phase indicates a total of approximately 15 possible hours devoted to penalty phase issues.

308-09. Mr. Scott testified that he made no attempt to obtain Donald's school records or develop evidence about his incarceration at Dozier. PCT 285.

Mr. Scott testified that based upon the experience that he has gained, an investigation into his client's employment history is a matter of course in a capital case. PCT 287. Elijah Robinson, who employed Donald Gunsby and thought that he was a very good worker, was never contacted by trial counsel, although he lived in Ocala, just a few blocks from counsel's office. PCT 517. Timothy Howard, a former sheriff's deputy who managed Parkside Apartments and hired the defendant, was never contacted by trial counsel. Mr. Howard would have testified that defendant was a stellar worker who was always polite and respectful to others. Mr. Howard would have further testified that others used to blame the defendant for things that he didn't do, even when the defendant was a child. PCT 520-21; 523.

Johnnie Mae Gunsby testified that she only met with trial counsel one time before she testified, and that was for 15-20 minutes. PCT 481. The next time Ms. Gunsby met with counsel was at the courthouse immediately prior to her testimony. PCT 481. Johnnie Mae Gunsby believes that she did not get an opportunity to tell the complete story of her nephew's background to the jury. PCT 482-83. Even the prosecutor acknowledged that Johnnie Mae Gunsby's story had been told originally in a very abbreviated fashion. PCT 486. Johnny Gunsby, Jr., the one sibling who made it out of the projects, was never contacted. PCT 512-13. Counsel called Joanne Gunsby to the courthouse, but she was never called to provide compelling testimony regarding defendant's background. PCT 552-53; 555. Trial counsel never went into Donald Gunsby's neighborhood to interview residents who

knew him, his family, and his difficult life as a child and an adult. PCT 553.

IV. EVIDENCE REGARDING MR. GUNSBY'S MENTAL CONDITION

A. Trial

Two mental health experts were called by Mr. Scott to testify at the original trial concerning Mr. Gunsby's mental condition: Dr. Ira Conley and Dr. Rodney Poetter.

Dr. Conley

Dr. Conley testified that he was a psychotherapist in private practice and a licensed psychiatric social worker. OPT 75. He had Masters degrees in psychiatric social work and pastoral psychology and Ph.D. degrees in pastoral psychology and mental health program evaluation and supervision. OPT 77. Prior to testifying at the Gunsby trial, Dr. Conley had been in private practice for three years and had performed approximately four or five forensic evaluations per month. OPT 75-76.

Dr. Conley was appointed as a confidential expert by the court to do an evaluation of Mr. Gunsby. As a result of that appointment, he met with Mr. Gunsby twice and spent a total of six and a half hours with him. OPT 78; 80. In the course of administering tests to Mr. Gunsby, Dr. Conley found that he had about a third grade reading comprehension level, a short attention span and impaired memory. OPT 79. Mr. Gunsby's reading ability was so limited that Dr. Conley had to read the Minnesota Multiphasic Personality Inventory ("MMPI") to him. OPT 82. On the basis of "Mr. Gunsby's MMPI", Dr. Conley concluded that

he was a paranoid schizophrenic. OPT 84-86. Dr. Conley concluded that Mr. Gunsby was not competent to stand trial. OPT 90-91.[7]

Dr. Poetter

Dr. Poetter was a licensed psychologist in private practice and had a Ph.D. in clinical psychology. OPT 48-49. Dr. Poetter was appointed by the Court to address the issues of Mr. Gunsby's competency to stand trial and his sanity at the time of the alleged offense. As a result of that appointment he met with Mr. Gunsby once for three hours. OPT 51; 69.

Dr. Poetter administered tests to Mr. Gunsby that addressed the areas of intelligence, memory, basic academic skills and motor skills. OPT 52. Dr. Poetter testified that the results of the intelligence test indicated that Mr. Gunsby had very severe intellectual limitations, and that he would fall within the mild range of mental retardation. His intelligence quotient was below the first percentile. OPT 53. The results of the academic tests indicated that Mr. Gunsby's spelling skills were on about a third grade level and that his reading skills were on about a fourth grade level, putting him in the bottom 1% of people his age. OPT 54-55. His memory skills were also very low, again putting him in the bottom 1% of the population as a whole. OPT 55.

During cross-examination, the state elicited testimony from Dr. Poetter that the statutory mitigating factors did not apply to Mr. Gunsby. He testified that although Mr. Gunsby would have been affected

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[7] Dr. Conley did not know whether Mr. Gunsby suffered from any organic mental disorder. OPT 103-04. There were indications that Mr. Gunsby might suffer from some neurological dysfunction, but Dr. Conley was only capable of doing some limited screening for neurological problems. OPT 104.

by his limited intelligence at the time he allegedly committed the subject crime, he was not mentally or emotionally disturbed[8] and was competent to stand trial. OPT 59-60. The state also elicited testimony from Dr. Poetter that he did not feel that Mr. Gunsby was a paranoid schizophrenic. OPT 63. His diagnosis of Mr. Gunsby was mild retardation, continuous alcohol abuse and an antisocial personality disorder. OPT 64-65.

Mr. Scott's redirect examination focused solely on trying to establish that Dr. Poetter had no basis for his opinion that Mr. Gunsby was not a paranoid schizophrenic because he had not administered the MMPI to him. Mr. Scott asked no questions to clarify or expand Dr. Poetter's testimony regarding Mr. Gunsby's mental retardation as a mitigating factor. OPT 65-67; 69-73.

Dr. Mhatre

The state called Dr. Umesh Mhatre to testify at trial concerning Mr. Gunsby's mental condition. Dr. Mhatre was a medical doctor with Board certification in adult and child psychiatry. OPT 19-20. Dr. Mhatre was appointed by the Court to examine Mr. Gunsby. As a result of that appointment, he met with Mr. Gunsby once for approximately one hour. OPT 24.

On the basis of his examination of Mr. Gunsby, Dr. Mhatre testified that the statutory mitigating factors did not apply to Mr. Gunsby. He found that Mr. Gunsby was sane at the time he allegedly

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[8] Dr. Poetter testified: "If by mental and emotional disturbance we're talking about some kind of severe mental illness where his perception of reality was very distorted, either by . . . false beliefs or hallucinations . . . the answer would be no . . . if we're talking about intellectual limitations . . . that is a chronic problem. . . He has it now and he would have been under the influence of limited intelligence at the time that the crime occurred . . .". OPT 60.

committed the subject crime, was not under the influence of extreme mental or emotional disturbance at the time of the crime, and was competent to stand trial. OPT 25-27. Mr. Gunsby evidenced no symptoms of paranoid schizophrenia. OPT 28-29. Dr. Mhatre testified that he saw no signs or symptoms of mental retardation during his interview with Mr. Gunsby. OPT 34. He explained that anybody with an IQ below 90 is considered retarded. OPT 34-35.

B. 3.850 Hearing

During the 3.850 hearing, the defense presented testimony from the three original mental health experts: Dr. Conley, Dr. Poetter, and Dr. Mhatre, all of whom acknowledged major shortcomings in their earlier work. The defense also presented the testimony of two experts specializing in forensic evaluations, Dr. Glen Caddy and Dr. Robert Phillips, who explained in detail Mr. Gunsby's serious mental deficiencies.

Dr. Conley

Dr. Conley testified that he has a Master's Degree in Divinity with a specialty area in Pastoral Counseling and a Master's in Psychiatric Social Work. He is working to complete his Ph.D. at the California Coast University in Santa Ana. He currently holds a license as a Clinical Social Worker. PCT 638-39; 641. Prior to going into private practice in 1986, most of his career was spent as an administrator and clinical supervisor in various mental health facilities. His evaluation of Mr. Gunsby was the first, and only, evaluation that he had ever done in a capital case. Between the time he went into private practice and the Gunsby trial, he was involved in a total of eight to ten evaluations of criminal defendants. PCT 644-45; 649-50.

Dr. Conley testified that he was appointed by the court in 1988 to conduct an evaluation of Mr. Gunsby and prepared a "psychosocial" evaluation report of his findings. He used the term "psychosocial," rather than "psychiatric" or "psychological," in order to stay out of trouble with the Department of Professional Regulations. PCT 639-42.

Dr. Conley testified that the court order asked him to determine if Mr. Gunsby was sane at the time of the offense, if he was competent to stand trial, and if he met the involuntary commitment standard under the Baker Act. The Order did not ask him to evaluate Mr. Gunsby for any possible mitigating factors, and his report did not address that issue. He conducted an examination of Mr. Gunsby that was designed to answer the questions asked in the Court's Order. PCT 642-44; Def.'s Ex. 39, App. at 26.

Dr. Conley testified that the primary basis for his diagnosis of Mr. Gunsby as a paranoid schizophrenic were the results of the MMPI test that he administered to Mr. Gunsby. He sent the test to the University of Minnesota for computerized scoring. Dr. Conley was unable to say exactly how much experience he personally had in administering and scoring the MMPI as of 1988. PCT 646-48.

Dr. Conley testified that he had one telephone conversation with Mr. Scott in which they discussed the results of the testing that he had done of Mr. Gunsby. They did not meet face-to-face to discuss his report. PCT 648-49; Def.'s Ex. 69, App. at 41.

Dr. Conley testified that he gathered some social background on Mr. Gunsby by speaking to his "sister" and some other family members whose identities he did not know. He felt that he should have done more investigation with Mr. Gunsby's family because an MMPI profile

like Mr. Gunsby's often indicates a disturbed family background. PCT 650.

Dr. Conley testified that Mr. Gunsby had some confusion and memory problems which he thought were related to his psychosis. When asked during the trial if Mr. Gunsby had organic brain damage, Dr. Conley testified that he did not know because he was not qualified to do the appropriate testing. In hindsight, Dr. Conley believed that he should have recommended that Mr. Gunsby be seen by a neurologist, since memory deficits are a signal that there may be some organic brain impairment. He took "full responsibility" for not having done that. PCT 657-59.

Dr. Conley testified that if he had been asked to evaluate Mr. Gunsby for mitigating factors, he would have referred him to a neurologist for evaluation based on his confusion and memory problems. However, because the Court's Order did not ask him to evaluate mitigating factors, and because he believed that the confusion and memory problems were related to a psychosis, he did not suggest to Mr. Scott that they obtain a neurological referral. PCT 659-61.

Dr. Poetter

Dr. Poetter testified that in 1988 a standard court order asked him to evaluate three issues: Mr. Gunsby: 1) was Mr. Gunsby competent to stand trial; 2) if he was not competent, did he meet the criteria for involuntary commitment to a psychiatric facility; and 3) was he legally insane at the time of the offense. The order was the standard order for a non-capital felony case. Nothing in the order asked him to address the two statutory mitigating factors relating to mental condition. He tailors his evaluation to the questions asked of him. PCT 874-76; Def.'s Ex. 41, App. at 32.

Mr. Scott did not ask Dr. Poetter to consider the applicability of the statutory mitigating factors. At the time that he prepared his report and testified, Dr. Poetter did not even know the details of the crime with which Mr. Gunsby was charged. Mr. Scott did not spend any time with Dr. Poetter prior to calling him as a witness. Dr. Poetter does not believe that his testimony during the penalty phase fully presented his views on Mr. Gunsby's mental condition and the applicable mitigating factors. PCT 876-78; 880-81; Def.'s Ex. 69, App. at 41.

Dr. Poetter testified that he administered the Wechsler Adult Intelligence Scale-R to Mr. Gunsby and found that his I.Q. was 57. That finding was consistent with his observations of Mr. Gunsby and his extensive prior experience in working with mentally retarded people. Had he been asked on the stand, Dr. Poetter would have been able to explain how that degree of retardation affects an individual's ability to function in society. Very little effort was made to humanize his testimony at the original trial or give examples to the jury about what a person with that I.Q. level knows and does not know.[9] PCT 881-83.

Dr. Poetter testified that during the 1988 trial, it was his opinion that Mr. Gunsby's capacity to conform his conduct to the requirements of the law was not substantially impaired. His opinions were qualified, however, because Mr. Gunsby's intellectual limitations

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[9] Examples that could have been used to illustrate the level of Mr. Gunsby's mental retardation for the jury include the following: Mr. Gunsby did not know where the sun rises or how many weeks are in a year. He had no idea why people who are born deaf would have difficulty learning to talk. He was able to answer the question how much is four dollars plus five dollars, but his answer was not scoreable because he took over 30 seconds to answer the question. PCT 883. Although there are people who have I.Q.'s in Mr. Gunsby's range who are working or who are productive, they are not the norm. Such individuals are only able to achieve those things with special family and occupational support. PCT 886-87.

would probably prevent him from appreciating all of the ramifications of his actions and making reasoned judgments. Mr. Scott did not make any effort to follow-up on that significant qualification. PCT 887-89.

As to the other statutory mitigating factor, Dr. Poetter testified that during the 1988 trial, he did not incorporate the concept of intellectual limitations into the concept of mental disturbance. Therefore, when he was questioned by the prosecution about whether or not Mr. Gunsby was under the influence of any extreme mental or emotional disturbance at the time of the crime, he answered no. Dr. Poetter did not have a chance to meet with Mr. Scott prior to his testimony to discuss what constitutes a mental disturbance, and Mr. Scott did not attempt to return to that subject on redirect examination in order to clarify Dr. Poetter's answer. If those things had been done, Dr. Poetter would have testified that Mr. Gunsby was under the influence of extreme mental disturbance at the time of the crime, and that that disturbance could be thought to mitigate his culpability for the crime. PCT 893-95.

Dr. Poetter testified that now that he is familiar with the facts of the crime, he sees a relationship between those facts and the role that Mr. Gunsby's retardation could have played in the commission of the crime. For example, the fact that the crime was committed openly with other people around, with no attempt to conceal what happened, is a choice that could be significantly affected by the level of cognitive skills available to the person making that decision. PCT 890-92.

Dr. Poetter testified that in 1988 he found that Mr. Gunsby suffered from an antisocial personality disorder. That opinion was based on the fact that Mr. Gunsby's criminal history went back to his childhood. He did not find anything in Mr. Gunsby's demeanor during

their meeting that was hostile or threatening. Mr. Scott did not provide Dr. Poetter with any information to flesh out that history. Dr. Poetter testified that he would have concluded that there was an alternative explanation for Mr. Gunsby's behavior in 1988, other than antisocial personality, if he had been provided with more information on Mr. Gunsby's background. PCT 896-900.

Dr. Poetter testified that it was his opinion that Mr. Gunsby would only be competent to stand trial if he received a lot of special attention from his counsel in interpreting the information presented to him, and that the information would have to be presented to him in very "concrete" terms. Consideration would also have to be made for the fact that he has memory problems. PCT 900-03. The testimony of Dr. Phillips and Dr. Caddy summarized below demonstrated that Mr. Gunsby did not receive that special attention.

Dr. Mhatre

Dr. Mhatre testified that he was appointed by the Court in 1988 to conduct a psychiatric evaluation of Mr. Gunsby. The court's order asked him to determine if Mr. Gunsby was sane at the time of the offense, if he was competent to stand trial, and if he met the involuntary commitment standard under the Baker Act. PCT 1031; Def.'s Ex. 40, App. at 29.

Dr. Mhatre testified that his report and testimony at the original trial were based solely on his interview with Mr. Gunsby. Mr. Scott did not provide him with any background materials regarding Mr. Gunsby, such as his school records, or information regarding the results of intelligence tests. PCT 1034-37.

Dr. Mhatre testified that if he had seen the results of the I.Q. test given to Mr. Gunsby by Dr. Poetter and been made aware of Mr.

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Dr. Mhatre testified that if he had seen the results of the I.Q. test given to Mr. Gunsby by Dr. Poetter and been made aware of Mr.

Gunsby's educational background, it would have changed his testimony. Specifically, he would have testified that Mr. Gunsby was not competent to stand trial, and that his mental retardation constituted a mitigating factor because it impaired his ability to conform his conduct to the law. PCT 1038-39.

Dr. Caddy

Dr. Glen Caddy testified to his extensive credentials as a clinical and forensic psychologist.[10] Dr. Caddy testified that he had met Mr. Gunsby on two occasions. He conducted a full-day assessment which occurred on February 10, 1994. The second half-day meeting occurred on March 3, 1994. Prior to the first meeting, he had read comprehensive documentary background materials that had been provided to him regarding Mr. Gunsby. He found that Mr. Gunsby had adapted quite nicely to life in jail.[11]

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[10] Dr. Caddy obtained his Ph.D. in psychology from the University of New South Wales in Australia. He is board certified in behavioral medicine and clinical psychology. He held a number of academic positions from 1973-1989, and in conjunction with his academic positions has also held a number of hospital staff positions. He has been a private consultant since 1989. He has published three books and approximately 90 articles in professional journals and given several hundred lectures to learned societies. He has also served as a consultant to numerous governmental jurisdictions and agencies. PCT 755-58; Def.'s Ex. 53.

Approximately 40-50% of his practice involves forensic evaluations of people involved in the criminal justice system. He has performed approximately 100 evaluations of defendants charged with capital offenses. He has testified in capital cases about 30-35 times. He has testified in excess of 100 times in general criminal cases. PCT 758-60.

[11] "I've examined many defendants. They normally do not have a particularly positive attitude to jailers in the sense of wishing to look up to greet them in a smile. He greeted everybody that walked by including the jail staff and seemed to interact with a degree of enlivenment and pleasure. Everybody who walked past him, the prisoners would sort of smile at him. From that point of view, he was doing quite nice socially." In part, he saw Mr. Gunsby's sociability as a genuine liking of people, but also saw it as the

Dr. Caddy testified that it was clear from the outset that Mr. Gunsby was not gifted in any way, but it was not clear how limited he was. His expressive language, while very limited, was adequate and he was able to answer simple questions. However, as soon as any abstraction or analysis was required, he saw the immediate breakdown that characterizes people of extremely limited intellect. Since Mr. Gunsby does not look out of the ordinary, and tries to present himself as favorably as he can, he may initially appear to be more intelligent than he really is. PCT 770-72.

Dr. Caddy testified that his formal testing of Mr. Gunsby consisted of tests of intellectual functioning, neuropsychological tests, and an MMPI. The results of the Wechsler Adult Intelligence Scale showed that Mr. Gunsby had an overall functional IQ in 1994 of 66 points.[12] Dr. Caddy testified that an IQ score of 66 is considered mentally retarded. The change from an IQ score of 57 to 66 does not mean that his actual intellectual ability has improved, but rather that he tested better in 1994 than he did in 1988. His ability to perform abstract reasoning and his analytical skills did not change during that time. PCT 786-87.

Dr. Caddy testified that he used an academic achievement test called the Jastak Wide-Range Achievement Test Level II to measure Mr. Gunsby's abilities in the areas of reading, spelling, and arithmetic. The reading tests showed that Mr. Gunsby has the ability

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very naive sociability of someone whose intellectual talents are extremely limited. PCT 769-70.

[12] Dr. Caddy testified that he believed Mr. Gunsby's score had improved over previous scoring for two principal reasons. First, he was a number of years away from being on the street. Second, and most important, in his years in prison he had learned to read. PCT 779-84, Def.'s Ex. 47.

to read at the fifth grade level. On spelling, Mr. Gunsby scored below the second grade level. His percentile ranking was .3%. In terms of his arithmetic ability, he was again below second grade. He was able to count from 1 to 10 but was unable to do any arithmetic calculations without the use of fingers. Mr. Gunsby could spell "cat," "run," and "arm." However, he could not spell "train," "shout," or "correct." He had no comprehension of multiplication or division. Examples of questions on the IQ test that he could not answer were the direction in which the sun rose, the number of weeks in a year, or what continent Brazil is located in. He could repeat up to four digits, but could not remember five digits. PCT 788-92.

Dr. Caddy testified that he administered a broad battery of neuropsychological tests known as the Halstead-Reitan Neuropsychological Test Battery. Mr. Gunsby tried his best to perform as well as he could on the neuropsychological tests. Dr. Caddy concluded that depending on which subtest is looked at, Mr. Gunsby ranged between mild or moderate neuropsychological impairment to severe neuropsychological impairment. On the test that measured broad diffuse brain impairment, Mr. Gunsby functioned in the severely mentally-impaired category. Mr. Gunsby scored brain damaged on all of the protocols that measure brain damage in the test battery.[13] PCT 792-802.

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[13] Dr. Caddy testified that there were various possible sources for Mr. Gunsby's diffuse brain damage, including childhood head trauma, genetic problems inherited from his parents, and intrauterine considerations, such as his mother's alcohol use and seizures during her pregnancy. PCT 818-20.

Dr. Caddy administered an MMPI test to Mr. Gunsby, which disclosed abnormal elements.[14]

Dr. Caddy testified that in order for Mr. Gunsby to have been able to participate in a competent trial process in 1988 his trial counsel would have needed a thorough appreciation of his intellectual limitations. Although Mr. Gunsby knew right from wrong at the time of the subject crime, he was not able to process information to help his lawyer during the trial. Nor could he appreciate the development of his defense strategy. PCT 810-815.

It was Dr. Caddy's opinion that Mr. Gunsby was not competent to stand trial in 1988. Mr. Gunsby could be made competent to stand trial today, provided that his limitations were well understood and truly taken into account by his counsel. However, it was his opinion that that did not take place in 1988 because Mr. Scott did not appreciate the depth of Mr. Gunsby's intellectual limitations and only spent about 13 hours with Mr. Gunsby to prepare his defense. PCT 810-12; 816-17; Def.'s Ex. 69, App. at 41.

There were two areas in which Dr. Caddy saw a connection between Mr. Gunsby's mental condition and his culpability for the crime for which he was convicted. Since it is known that Mr. Gunsby was drinking on the day in question, it is very likely that alcohol would have been a contributory factor in this crime. The other contributory factor is

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[14] Dr. Caddy testified that although Mr. Gunsby is not paranoid in the classical diagnostic sense, there is a paranoid flavor to his MMPI profile. This is consistent with the MMPI profile that was administered back in 1988 by Dr. Conley. Dr. Caddy testified that he perceived the score as reflecting a general suspiciousness rather than a specifically developed paranoid delusional state. His profile also showed an elevation on the schizophrenia index. This, too, was consistent with the earlier MMPI test that was given by Dr. Conley. PCT 803-09.

that, given his intellectual limitations, if Mr. Gunsby committed the crime it is extremely likely that he was under the influence of others. This was not an act that he initiated without the involvement of others. Dr. Caddy testified: "What's interesting about Mr. Gunsby is that he doesn't present in any of the material that I have had access to, nor does he in personal encounter present, as a person who is likely to be motivated to do an incredibly violent deed. This is a man who seemed to be most at home with children." Given the information that there were others at the scene of the crime, if Mr. Gunsby was there, he would have been a follower, not a leader. If Mr. Gunsby were the one firing the gun, it would have been at the instruction or encouragement of others. PCT 820-23.

Dr. Caddy testified that this crime was committed while Mr. Gunsby was under the influence of extreme mental or emotional disturbance because he suffers from a permanent and non-reversible mental illness of retardation that is so profound as to call into question his capacity to make competent judgments and to appreciate all the elements of his actions, particularly their consequences. PCT 823.

Dr. Caddy testified that the capacity of Mr. Gunsby to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired at the time of his crime because of the combination of his state of retardation and the use of alcohol, and also the influence of others. PCT 824.

Dr. Caddy testified that the IQ testing done by Dr. Poetter in 1988 was done appropriately. However, he disagreed with Dr. Poetter's finding that Mr. Gunsby was competent to stand trial in 1988 based on Mr. Gunsby's self-report that he had obtained a GED in 1974. There was nothing in the IQ profile that Dr. Poetter performed that would have

led him to believe that Mr. Gunsby could have functioned at a prior level that would have enabled him to obtain a GED. PCT 825-28, Def.'s Ex. 47.

Dr. Caddy testified that he disagreed with Dr. Poetter's diagnosis that Mr. Gunsby suffered from an anti-social personality disorder. Dr. Poetter's diagnosis that Mr. Gunsby was antisocial seemed to be based solely on the fact that he was in jail for murder and had a prior criminal history. When undertaking this type of personality evaluation, it is necessary to adjust for IQ scores as low as Mr. Gunsby's. Absent his criminal history, there are no substantial indications that Mr. Gunsby functioned in an antisocial manner. An antisocial person is one who cares for virtually nobody but himself. Mr. Gunsby appears to love all of the people in his life, even those who did not do a wonderful job in his rearing. He also shows liking for his fellow prisoners and his jailers. PCT 829-32. Dr. Poetter should have had a neuropsychological evaluation done of Mr. Gunsby. PCT 863-64.

Dr. Caddy testified that Dr. Conley's diagnosis of Mr. Gunsby as a chronic paranoid schizophrenic was obviously wrong. There was almost no basis of a clinical nature for reaching that conclusion. PCT 833-35. Dr. Caddy testified that Dr. Conley derived his diagnosis of paranoid schizophrenia by relying too much on the machine-scored results of the MMPI that was administered to Mr. Gunsby. The MMPI machine scoring did not take into account Mr. Gunsby's neuropsychological or intellectual functioning. It was Dr. Caddy's opinion that a clinical social worker, such as Dr. Conley, was not qualified by training to undertake any psychological test protocol assessment. PCT 836-38; Def.'s Ex. 42.

It was Dr. Caddy's opinion that Dr. Mhatre's finding that there was nothing wrong with Mr. Gunsby was obviously inaccurate. He did not believe that Dr. Mhatre would have been able to arrive at an accurate opinion about Mr. Gunsby's mental state in a one hour meeting, particularly without performing any objective testing. PCT 838-40; Def.'s Ex. 44.

Dr. Caddy testified that organic brain damage goes beyond intellectual functioning and affects perception, memory, and motor skills. PCT 863.

Dr. Phillips

Dr. Phillips testified to his extensive credentials in the field of forensic psychiatry.[15]

Dr. Phillips testified that he did an extensive analysis of the background materials and literature that were provided to him regarding Mr. Gunsby's history. In reviewing those materials he found a psycho-social history which he described as being very impoverished in terms of both the physical and emotional conditions under which Mr. Gunsby existed. PCT 927-930.

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[15] He is currently the Deputy Medical Director of the American Psychiatric Association. PCT 914. He holds several graduate degrees, including a Ph.D. in Science Education from the Science Education Center at the University of Iowa and a Doctor of Medicine degree from the Mayo Medical School at the Mayo Clinic in Rochester, Minnesota. He also completed a post-doctoral fellowship in psychiatry at the Yale University School of Medicine where he also served as Chief Resident of Psychiatry. He subsequently joined the faculty of Law and Psychiatry as Assistant Clinical Professor of Psychiatry and the Law. He continues to hold that academic appointment, as well as being an adjunct professor of Correctional Mental Health at the graduate school of Health Sciences at the New York Medical College. PCT 915-16; Def.'s Ex. 51.

Dr. Phillips testified regarding his background and experience in the field of forensic psychiatry, including his appointment and service as Director of Forensic Services for the State of Connecticut Department of Mental Health and as the Chief Executive Officer of the Whiting Forensic Institute, which is Connecticut's sole maximum security hospital. He has also served as a consultant to numerous federal and state agencies in the field of forensic psychiatry. For example, he is a psychiatric expert consultant to various federal agencies who have either an interest in or are concerned with policies, practices, standards, and procedures for the provision of mental health services in correctional institutions. He has also lectured on numerous occasions nationally and internationally in the field of forensic psychiatry and has published extensively in the field as well. PCT 917-19; Def.'s Ex. 51.

Dr. Phillips testified that he has been involved in approximately 30-40 evaluations in death penalty cases and has probably testified half a dozen times in such cases. He has also submitted at least a dozen reports in his private practice and has been involved in various levels of criminal adjudication in his capacity as the state forensic director in Connecticut. PCT 919; Def.'s Ex. 51.

Dr. Phillips' initial examination of Mr. Gunsby was conducted at the maximum security institution in Starke in January of 1993. He spent about a total of six hours with Mr. Gunsby during that examination. He also met with Mr. Gunsby for about one hour on the evening prior to presenting his testimony at the 3.850 hearing. PCT 932-33. He prepared a report following his examination of Mr. Gunsby. PCT 934; Def.'s Ex. 52.

Dr. Phillips testified that based on his examination of Mr. Gunsby, it was his opinion that Mr. Gunsby has a significantly sub-average level of intellectual functioning that renders him incapable of functioning at a level that we would expect of someone of normal mental age function. He is mentally retarded. He has identifiable levels of deficits in intellectual functioning that are consistent with someone who is mentally retarded and brain-damaged. PCT 934-36.

Dr. Phillips testified that the likelihood of someone being able to detect Mr. Gunsby's level of function is exponentially related to the amount of data that you have before you meet him and the amount of time that you spend with him.[16] PCT 940.

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[16] Dr. Phillips used the example of the Peter Sellers character in the movie "Being There", as an example of someone who probably operated at about the same level of intellectual dysfunction as Mr. Gunsby, but on whom the world projected a level of intelligence simply because he was able to nod his head and look appropriate at the right times. Dr. Phillips testified that it is the same with Mr. Gunsby: if one only spends ten or fifteen minutes with him and talks only about some very superficial things in which he has an interest, one would not detect his level of cognitive impairment. However, if one spends more time with him and actually pushes through to find out what he knows, what he understands, what kind of information he can manipulate, and what is his true fund of knowledge, it does not take very long to find out that one is dealing with someone who is significantly impaired. As he spent more time with Mr. Gunsby, he began to perceive this impairment because of Mr. Gunsby's inability to think abstractly and to manipulate data. His inabilities in those areas led Dr. Phillips to want additional neuropsychological testing to be done in order to determine Mr.

Dr. Phillips testified that part of his diagnosis of Mr. Gunsby involved a nonspecific personality disorder, which is a personality not otherwise specified, with immature and dependent features. The most prominent features of this personality disorder for Mr. Gunsby are his immaturity, which is a function of his intellectual retardation, and his dependency. Someone with a dependent personality feature usually derives much of his direction and satisfaction from pleasing others, whereas a more stable and solidly developed individual will use others as a barometer for his actions, but will also feel free to do what he wants irrespective of what others think. Someone with a dependent personality is constantly seeking validation from others and so tends to be very ingratiating. Such a person can also be strung along easily because all he really wants is for someone to validate him. PCT 947-50.

Dr. Phillips testified that he believes that Mr. Gunsby's mental retardation, organic impairment because of his substance abuse, and personality disorder are all factors which were related to the commission of this crime. His mental retardation would have impacted Mr. Gunsby's ability to modulate his emotions and behavior in response to a particular fact situation. That inability would have been further exacerbated by his abuse of alcohol, which would have greatly increased the impulsiveness of his behavior. His personality disorder was such that he would have been highly likely to have been influenced by others. PCT 951-54.

Dr. Phillips testified that he believed that Mr. Gunsby suffered from a severe emotional and mental disturbance at the time of the

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Gunsby's level of intellectual functioning. PCT 940-44.

crime, i.e., his mental retardation. In addition, Mr. Gunsby's chronic alcoholism would have contributed to his behavior at the time of the crime and should also be considered a mental illness that would impact his ability to behave within the standards of the law. PCT 954-55.

Dr. Phillips testified that although he did not believe that Mr. Gunsby was so impaired at the time of the crime that he could not distinguish right from wrong, his cognitive impairments would have made him incapable of conforming his behavior to the requirements of the law.[17] PCT 955-56.

Dr. Phillips testified that he did not think that Mr. Gunsby was competent at the time of his trial in 1988. He believed that Mr. Gunsby did not have the capacity to do the work that was necessary in the courtroom and to work with his attorney to process information and to track what was happening during his trial. Nor did he believe that Mr. Scott spent the kind of time with Mr. Gunsby that would have been necessary to educate him to a level of competence. PCT 956-58.

Dr. Phillips testified that Dr. Mhatre's psychiatric evaluation of Mr. Gunsby in 1988 did not meet the standards of care for a forensic psychiatric evaluation. It was incomplete and failed to meet the standard of practice. PCT 960-61.

Dr. Phillips has seen and diagnosed many malingerers and does not believe that Mr. Gunsby is one. Mr. Gunsby is the type of person who is going to try to put his best foot forward at any cost. PCT 983-84.

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[17] Dr. Phillips testified: "So that in an individual like this, knowing the difference between right from wrong really is going to be immaterial because he lacks the ability to integrate that information with the next most important behavioral phenomenon which is processing and making a decision. And he lacks the capacity to make appropriate decisions because he's got faulty equipment." PCT 955-56.

Dr. Penrod

All of the five mock juries studied by jury expert Steven Penrod gave the mental health experts and the mental health from the original trial very low ratings. The jurors did not find the doctors very credible and the great majority did not believe the evidence established any mental retardation or mental illness. PCT 605-09. By contrast, the mock jurors who did believe that the defendant was mentally ill or mentally retarded tended to vote for life rather than death. PCT 609-10.

Ed Scott

During the 3.850 hearing, Mr. Scott testified that he did not request the three mental health experts to evaluate the defendant for statutory and nonstatutory mitigating factors. Instead, he submitted "boiler plate" orders designed for non-capital felony cases in which mitigation is not an issue. PCT 273-74; Def.'s Exs. 39, 40, 41, App. at 26, 29 and 32. He presented no background information to the mental health experts to assist in their evaluations. PCT 283-87. Mr. Scott testified that he spoke with Dr. Poetter by phone (PCT 280), but neither Dr. Poetter's expense records nor Mr. Scott's timesheets show any contact whatsoever, and Dr. Poetter recalled none. PCT 877-78. He did not interview or depose Dr. Mhatre prior to his appearance as a state witness. PCT 280; 309; Def.'s Ex. 69, App. at 41.

Mr. Scott testified that he thought Dr. Conley was a psychologist, and that it was not adequate to have Mr. Gunsby examined by a clinical social worker. PCT 275. Mr. Scott testified that he had several conversations with Dr. Conley. PCT 277. However, his timesheet indicates only one contact with Dr. Conley of .20 hours (12 minutes),

and Dr. Conley recalls only that one brief telephone call. PCT 648-49; Def.'s Ex. 69, App. at 47.

Mr. Scott had no tactical reason for failing to fulfill his duty to prepare properly for the penalty phase; he repeatedly attributed his failure merely to inexperience. PCT 278; 280-81.

The state did not challenge the defense evidence regarding the defendant's mental condition and presented no expert testimony at the 3.850 hearing. The state also conceded in response to questioning by the Court that the original diagnoses of Dr. Mhatre and Dr. Conley were inaccurate and invalid. PCT 981.

SUMMARY OF ARGUMENT REGARDING THE PENALTY PHASE

The circuit court found that Mr. Gunsby's defense counsel had rendered ineffective assistance in two respects. First, he failed to object when the state mischaracterized his prior convictions. The state argues that the circuit court erred principally because the deficiency was not prejudicial. However, three jurors recommended life even with the improper evidence. Moreover, in a remarkably similar case, *Duest v. Singletary*, the Eleventh Circuit detailed the extreme prejudice resulting from a jury erroneously believing that a capital defendant had tried to kill someone in the past.

The circuit court also ruled that Mr. Gunsby was entitled to a new penalty phase proceeding because his defense counsel was ineffective in presenting his serious mental deficiencies to the jury. All three experts who testified at the original penalty phase acknowledged serious mistakes when called to testify at the 3.850 hearing. The state argues that the circuit court erred principally because defense counsel did present helpful mitigating evidence at the original trial that Mr. Gunsby suffered from paranoid schizophrenia. However, that

testimony was flatly contradicted by two other experts, one of whom said Mr. Gunsby was mentally retarded but not schizophrenic and the other who said he had no mental deficiencies. This hopelessly conflicting and unpersuasive expert testimony was the direct result of counsel's failure to investigate Mr. Gunsby's mental condition adequately.

Mr. Gunsby is entitled to a new sentencing phase proceeding for three other instances of ineffective assistance of counsel and three separate constitutional violations not reached by the circuit court. First, at the 3.850 hearing the defense demonstrated that the prejudice to Mr. Gunsby from trial counsel's deficient mental condition investigation was exacerbated by his failure to present the abundance of evidence regarding the appalling circumstances of abuse and poverty under which this retarded black orphan was raised. Second, trial counsel failed to object to the court's dismissal of two jurors in violation of *Witherspoon v. Illinois*. Third, trial counsel failed to object to an unconstitutionally vague instruction regarding aggravating factors. Fourth, the consistent testimony of five experts at the 3.850 hearing was that Mr. Gunsby was incompetent at the time of his original trial. (This, of course, necessitates not only a new penalty phase proceeding, but a new guilt/innocence trial as well.) Fifth, in light of the serious errors acknowledged by each of the three original mental health experts, Mr. Gunsby received inadequate expert assistance in violation of *Ake v. Oklahoma*. Finally, execution of a retarded individual violates both the United States and Florida Constitutions. Even if this Court should find that none of these issues individually warrants a new penalty phase proceeding, their cumulative effect certainly does so.

ARGUMENT REGARDING THE PENALTY PHASE

I. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO OBJECT TO FALSE STATEMENTS ABOUT MR. GUNSBY'S PRIOR RECORD.

The standard for ineffective assistance of counsel established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984) has been interpreted in Florida to require that the defendant show each of the following:

(1) Particular acts or omissions of his counsel that are outside the broad range or reasonably competent performance under prevailing professional standards; and

(2) This clear, substantial deficiency so affected the fairness and reliability of the proceeding and the confidence of the outcome is undermined.

Maxwell v. Wainwright, 490 So. 2d 927 (Fla. 1986). This standard is readily met here.

The circuit court found that defense counsel's failure to object to repeated misstatements about Mr. Gunsby's prior record constituted

an obvious example of ineffective assistance of counsel.[18] The state makes three objections to the circuit court's determination.

First, the state argues that since the prosecution has a right to introduce the facts and circumstances of a defendant's prior violent convictions, "defense counsel would not have been able to keep the fact that a firearm was used in both of those offenses from the penalty phase jury." State's Brief at 19. The most obvious problem with this argument is that the most significant prejudice to Mr. Gunsby came not from the reference to firearms but from the prosecutor's transformation of aggravated assault into assault with intent to commit murder. The state was, in effect, telling the jury that the Awadallah killing was no fluke; Mr. Gunsby had done his best to try to commit murder before. This damaging connection is what provoked the Eleventh Circuit to pronounce: "The implication that [the defendant] had acted with murderous intent in committing armed assault [in another case] might well have had a particular impact on a jury considering whether

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[18] The circuit court found it unnecessary to reach another aspect of trial counsel's ineffective assistance with respect to aggregating factors. The state not only introduced evidence that Mr. Gunsby was under sentence of imprisonment at the time of the instant offense, it produced evidence that the sentence of imprisonment was for possession of a firearm by a felon and carrying a concealed firearm, specifically a shotgun. The prosecutor then referred to the shotgun as "filed off", thereby identifying it as a weapon with only a murderous purpose, even though no evidence was introduced on this point. The state's introduction of evidence regarding the *nature* as well as the *fact* of Mr. Gunsby's sentence of imprisonment put before the jury evidence of a non-violent felony conviction, and a particularly prejudicial one in view of the prosecutor's argument about Mr. Gunsby's fondness for firearms. OPT 127-28. This violated Florida law that a defendant's commission of a non-violent felony is not a statutory aggravating factor and may not be introduced by the state in a death penalty proceeding. *Mann v. State*, 420 So.2d 578 (Fla. 1982). Mr. Scott's failure to object to the improper admission of this prejudicial testimony and to this false statement by the prosecutor constitutes a separate instance of ineffective assistance warranting a new penalty phase proceeding.

to recommend life or death." *Duest v. Singletary*, 997 F.2d 1336, 1339 (11th Cir. 1993). The state's brief offers no response whatsoever to this kind of prejudice.

Another problem with the state's argument is that defense counsel *would* in all likelihood have been to keep the use of firearms from the penalty phase jury. Had defense counsel objected to the improper statements, the state would have had to produce *evidence* of the use of a firearm in the prior offenses. Neither at the 3.850 hearing nor in its brief has the state offered any indication that it was prepared at the penalty phase to present actual testimony from witnesses to the prior offenses, and there is no precedent for allowing documentary evidence of charges that were ultimately dismissed to go before the jury to establish the facts and circumstances of a prior violent crime.[19] Thus, a proper objection by defense counsel would have left the state able to present only the fact of the aggravated assault and robbery convictions and nothing further.

The second objection made by the state is that the circuit court's finding of prejudice is erroneous because the jury instructions properly referred simply to robbery and aggravated assault and "the court failed to consider the presumption that juries follow the instructions given by the court." State's Brief at 19. There are three problems with this argument. First, the circuit court's instruction regarding prior offenses *referred* to the correct

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[19] This Court has made clear that the confrontation clause applies to the penalty stage of death penalty cases and that the defendant must have the opportunity to cross examine any evidence presented. *See, e.g., Walton v. State*, 481 So. 2d 1197, 1200 (Fla. 1985); *Rhodes v. State*, 547 So. 2d 1201, 1204 (Fla. 1989); *Lucas v. State*, 568 So. 2d 18, 21; *accord Lord v. State*, 806 P.2d 548, 557-88 (Nev. 1991) (following *Walton* and extending confrontation clause to penalty phase in Nevada).

convictions, but it did not *correct* the prosecutor's misstatements. Accordingly, the jury could actually have followed the court's instructions and still been influenced by the prosecutor's false statements. Second, the presumption that jurors follow the instructions given by the court is far from absolute. The Supreme Court recognized the reality that jurors cannot always be expected to follow a court's instructions in *Bruton v. United States*, 391 U.S. 123, 135 (1968)("[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.") This Court has reflected the same realistic understanding of human nature in considering the very question at issue, i.e., improper prosecutorial statements regarding aggravating factors. In *Gerald v. State*, 601 So.2d 1157 (Fla. 1982), the prosecutor improperly referred to prior non-violent felonies, triggering an objection followed by a curative instruction to the jury to disregard the question. *Id.* at 1161. This Court observed: "Although the judge gave a so-called "curative" instruction for the jury to disregard the question, such instructions are of dubious value. Once the prosecutor rings that bell and informs the jury that the defendant is a career felon, the bell cannot, for all practical purposes, be "unrung" by instruction from the court." *Id.* at 1162. Finally, the state cannot seriously expect this court to find no prejudice without even addressing the extensive research of Dr. Penrod proving that prejudice existed.

The state's third objection is that the circuit court erred in relying upon *Johnson v. Mississippi*, 486 U.S. 578 (1988), and related cases, which reversed death penalties based upon prior convictions that

were subsequently set aside. The state claims that *Johnson v. Mississippi* "has nothing to do with [the instant] situation" because Mr. Gunsby's penalty phase jury did not receive any inaccurate *evidence* concerning his criminal history; the jury only heard false statements from the *prosecutor*. State's Brief at 21. This is just another version of the prior argument that a prosecutor's statements have no impact on the jury. Yet the state has offered neither evidence nor argument as to why prosecutorial statements are of no significance whatsoever to a jury. The logical import of the state's argument is that a prosecutor can say whatever she wants to the jury because it has no effect. This is manifestly not the law in Florida or anyplace else. *See, e.g., Davis v. Zant*, 36 F.3d 1538 (11th Cir. 1994).[20]

There could be no excuse for trial counsel's failure to prevent these misstatements, and Mr. Scott admitted it. The Eleventh Circuit recently confirmed that a defense lawyer ought to know his client's record. *Jackson v. Herring*, 42 F.3rd 1350, 1365, (11th Cir. 1995). In *Duest*, the Eleventh Circuit confirmed the prejudice arising from such erroneous information going to the jury. The state has done nothing whatsoever to establish that statements by a prosecutor to a jury are meaningless, and Dr. Penrod's testimony proves that they were prejudicial in this case. The circuit court was correct in ordering a

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[20] The state also argues that an objection to the prosecutor's misstatements would only have resulted in a correction by the prosecutor. This is simply a rehash of the prior arguments. The argument assumes that a correction from assault with attempt to commit murder to aggravated assault would have been irrelevant to the jury, a point rejected by the Eleventh Circuit in *Duest*. The argument also assumes that the state either had evidence of the use of pistols in the prior offenses that it was prepared to offer or that the charging documents would have been admissible to prove use of a pistol, neither of which the state has even attempted to establish.

new penalty phase trial because of ineffective assistance of counsel in this matter.

II. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN PRESENTING MR. GUNSBY'S MENTAL CONDITION TO THE JURY.

The circuit court found that Edward Scott was ineffective in his presentation of Mr. Gunsby's mental state to the jury during the penalty phase. In evaluating the circuit court's determination, this Court's task is eased by the fact that there is no dispute regarding Mr. Gunsby's mental condition. Important defense evidence at the Rule 3.850 hearing was presented through the state's own trial expert. The state chose to offer no expert testimony whatsoever at the Rule 3.850 hearing, leaving the testimony of the two new experts called by the defense completely uncontradicted. Thus, the defendant's mental condition is clear: He is mentally retarded. PCT 810; 934. His I.Q. was properly tested at 57 in October 1988 (PCT 783; 881) and 66 in February 1994. PCT 780. He suffers from severe organic brain damage (PCT 800; 802-803; 935) and a personality disorder with immature and dependent features. PCT 948. His retardation is exacerbated by a background of tremendous financial and emotional impoverishment. PCT 850-51; 928. His mental condition constitutes a significant statutory and non-statutory mitigating circumstance. PCT 820-24; 895; 951-56.[21] The trial court noted the significance in human terms of these clinical findings: "In 1988 his I.Q. was below the first percentile and at the second percentile after his second testing in 1994. His reading is at

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[21] The state asserts that there are inconsistencies between the defense experts which "blunt the impact of that testimony". State's Brief at 35. Any inconsistencies, such as whether Mr. Gunsby's brain damage was principally caused by alcohol abuse, are trivial when compared to the experts' agreement that Mr. Gunsby was mentally retarded, brain damaged, and has abnormal personality features.

the second percentile, his spelling at the .3 percentile, and his arithmetic skills are at the .06 percentile. He does not know how many months are in a year or in what direction the sun rises." Order, App. at 18-19.

The jury that recommended the death sentence for Donald Gunsby did not have the benefit of this strong expert consensus on the severity of Mr. Gunsby's mental impairment. Instead, the jury heard from three experts whose unprepared, incomplete, and hopelessly conflicting testimony was utterly unpersuasive. The state's psychiatrist, Dr. Mhatre, testified at the penalty phase, inaccurately, that the defendant had no mental impairment and was of normal intelligence. OPT 34-35; PCT 839-40. The clinical social worker called by the defense, Dr. Conley, testified at the penalty phase, inaccurately, that the defendant suffered from paranoid schizophrenia. OPT 89; PCT 832-38. Rounding out the trio of mistaken experts, the court appointed psychologist called by the defense, Dr. Poetter, testified at the penalty phase as to the defendant's I.Q., but provided little elaboration or explanation of its significance. OPT 53; 58; PCT 882-83. He conveyed the impression that the statutory mitigating factors regarding mental condition, § 921.141 6(b) and (f), did not apply. PCT 888-94; See FN 8. Dr. Poetter acknowledged at the 3.850 hearing that his trial testimony did not fully and completely present his view on Mr. Gunsby's mental condition and the applicable mitigating factors. PCT 878; 888; 894. He also testified at the penalty phase, inaccurately, that the defendant exhibited an anti-social personality disorder. OPT 64; PCT 829-32; 898.

Having heard firsthand from Ed Scott and the three original experts about the gross errors in diagnosis at the penalty phase, the

trial court concluded that four separate deficiencies in the investigation into Mr. Gunsby's mental condition conducted by his first year lawyer were largely responsible for the erroneous expert testimony: the social worker chosen by Mr. Scott as the defense confidential expert was not qualified; because boilerplate orders were used, the experts were never asked to evaluate Mr. Gunsby specifically for mitigating factors; Scott provided no background information on Mr. Gunsby to the experts; and Mr. Scott had no contact with the Dr. Mhatre or Dr. Poetter prior to their testimony. He only had one 12-minute phone conversation with Dr. Conley. PCT 648. Having absorbed the significance of Mr. Gunsby's pathetic mental state and contrasted it with what the jury heard, the trial court concluded that the errors denied Mr. Gunsby a fair trial.

The circuit court's conclusion must be affirmed unless shown to be an abuse of discretion. The state raises four unpersuasive arguments in an effort to meet this burden. To begin with, the state raises a series of complaints about the significance the circuit court placed on the jury's ignorance of Mr. Gunsby's organic brain damage. First, the state disputes the circuit court's conclusion that the boilerplate orders were causally connected to the experts' failure to diagnose brain damage. This assertion conveniently ignores the testimony of Dr. Conley. As the defense confidential expert and therefore the person trial counsel would have expected to work with most closely in developing mitigating evidence, Dr. Conley specifically stated that he would have followed up on indications of brain damage if asked to identify any mitigating factors. PCT 659-61. Since he was asked only to evaluate Mr. Gunsby's competence and sanity at the time of the offense, his diagnosis of schizophrenia answered those questions

and left no need to go further. PCT 659-61. The same is undoubtedly true of Dr. Poetter and Dr. Mhatre.

Next, the state argues that "the mitigating value of [the brain damage] testimony is, at best, minimal" because there "is no connection between Gunsby's purported brain damage and the murder at issue in this case." State's Brief at 24. The record of the Rule 3.850 hearing provides the only response needed to the state's argument:

Testimony of Dr. Caddy:

> Question: Do you see a connection between the mental condition you've described and the commission of this crime or his culpability for the commission of this crime?
>
> Answer: There are a couple of areas that I think would need to be explored. . . We. . . know that on the day in question he had been drinking. Hence, if, in fact, he was on the scene and the man who committed this crime, it is very likely that the intrusion of the effects of alcohol would have been a contributory factor. . . I think the other major element is that given the intellectual limitations of this man, if he committed the crime as judged, it is extremely likely that he was under the influence of others and the suggestions of others and that this was not an act that he initiated in the absence of others' involvements. . .
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> * * *
>
> If Mr. Gunsby did as he has been convicted, it would seem that the basis must have been that he was going to do something somehow for the community that is unlikely to be an act that he would have done by himself. In fact, my only construction of how this may have happened if he did it was that he did it as a servant of the community, not as an independent malicious sort of highly organized and planned activity because he doesn't have the capacity to do that.

PCT 820-823. (emphasis added)

Testimony of Dr. Phillips:

> Question: I am going to ask you, if you could, to give us your opinion on whether those aspects of Mr. Gunsby's mental functioning are related in your mind to the commission of this crime and the specific facts of this offense?

Answer: [T]his man was mentally retarded. This man was organically impaired because of his substance abuse. . . . This man was--his personality disorder was such that he was both immature and dependent in the way in which he interacted with people and as such is highly likely to have been influenced by others. . .

* * *

I think what leads me to believe that his impulsivity index was fairly high was the fact that he is not only mentally retarded but he's also using alcohol.

PCT 951-52. (emphasis added)

Testimony of Dr. Poetter:

Question: Do you see ways related to this particular crime and to Mr. Gunsby in which his mental retardation affects his ability to conform his conduct to the law?

Answer: . . . My understanding is that this crime was committed openly with other people around and in a very dramatic fashion. And it's that kind of decision and that kind of action, I think, that could be affected substantially by an individual's cognitive deficits and by his inability to really understand not that what he was doing was wrong but the gravity of the situation and the types of influences that might been in effect at the time that the act was committed.

* * *

But there are a lot of options. And at the extreme, at the very extreme, one shoots someone and kills them. And that kind of extreme behavior, that kind of extreme response, I think could -- the choice of that response could be significantly affected by the level of cognitive skills available to the person making that kind of decisions.

PCT 890-92. (emphasis added).

Next, the state asserts that the mitigating value of the organic brain damage is so minimal that "it does not outweigh the heavy aggravation present in this case." State's Brief at 24. The "heavy aggravation", of course, included no recent convictions but only two dredged up from 17 and 20 years before the trial, respectively; included no escape but only a failure to appear for sentence for a nonviolent offense; and included a cold, calculated and premeditated

crime on the part of someone experts have now universally concluded is incapable of much calculating at all. *See, e.g., Spencer v. State*, 645 So.2d 377 (Fla. 1994) ("[W]e find the evidence offered in support of the mental mitigating circumstances also negate the cold component of the C.C.P. aggravator.") Moreover, the state ignores the prior history of the case--even with the conflicting and incomplete testimony presented at the sentencing phase, three of the twelve jurors voted against death and this Court came within one vote of prohibiting death on a proportionality analysis. Finally, this Court has recognized the significance of brain damage as a mitigator. *See, e.g., Knowles v. State*, 632 So.2d 62 (Fla. 1993). As Dr. Caddy explained, brain damage goes beyond intellectual functioning, affecting perception, memory, and motor skills. PCT 863

The state's final argument regarding brain damage is one introduced in this section of the brief but to which the state returns in one form or another no less than eight times in the succeeding pages. See State's Brief at 25, 26, 31, 33, 34, 39, 40, 41. The state is fixated on the idea that the erroneous testimony of Dr. Conley that Mr. Gunsby was schizophrenic was *better than* the truth and that the penalty phase testimony was therefore more favorable than the testimony at the Rule 3.850 Hearing. The state, of course, has conceded that Dr. Conley's diagnosis of schizophrenia was wrong. Absent the testimony from other experts, the state's argument might pose an interesting hypothetical question--could a defense counsel be ineffective for presenting helpful but completely inaccurate testimony? This is not such a case. The problem with Dr. Conley's testimony was not only that it was wrong, but that it was not persuasive in view of the conflicting testimony by their experts. Mr. Scott's failing was not simply in

presenting Dr. Conley's testimony, it was putting on Dr. Conley and failing to do the preparation work with all three doctors that would have avoided the fatal inconsistencies in their testimony. He never would have been able to present consistent testimony without a correction in Dr. Conley's diagnosis since Dr. Conley was wrong and it was unlikely that he would ever have been able to convince Dr. Poetter and Dr. Mhatre to adopt Dr. Conley's position. Accordingly, Mr. Scott wound up with the worst of all possible worlds: incorrect *and* inconsistent mental health testimony. Dr. Penrod's jury study showed how little regard the jury had for this kind of testimony. PCT 605-09.[22]

The state's second argument is that the circuit court failed to follow the requirement of *Strickland v. Washington* that decisions of

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[22] Another response needs to be made to the state's argument about brain damage. The state would have this Court conclude that simply adding the diagnosis of brain damage to the other evidence presented at the penalty phase would make little difference. It is true that Judge Sawaya's order focused on the brain damage diagnosis because its absence from the penalty phase testimony was so striking. But the impact of Mr. Scott's deficiencies went far beyond merely foreclosing the jury's opportunity to hear about Mr. Gunsby's brain damage. Mr. Gunsby has clearly diagnosed, severe mental deficiencies that were laid out in uncontested testimony at the 3.850 hearing. The trial jury should have heard the same clarity and consistency. Had Mr. Gunsby been effectively represented at the penalty phase, there would have been no testimony from the state's psychiatrist that he had no mental deficiency at all, there would have been no testimony from the court appointed psychologist that he suffered from antisocial personality disorder, there would have been no testimony from the same psychologist that the statutory mitigating factors did not apply, and there would have been no testimony from an unqualified defense expert that Mr. Gunsby suffered from schizophrenia, an inaccurate and conflicting diagnosis that undoubtedly damaged the credibility of the entire defense presentation. Thus, this Court should firmly decline the state's invitation to evaluate this case merely by factoring in a brain damage diagnosis to the existing penalty phase record. Had counsel been effective, virtually the entire penalty phase would have been different and much more similar to the powerful 3.850 hearing record.

counsel are entitled to great deference. Instead, the state contends that the circuit court's order is based upon Edward Scott's own testimony and "an evaluation based solely upon hindsight, which, as is axiomatic, is 20/20." State's Brief at 27. The state's argument might be of interest if the deficiencies by Mr. Scott were strategic choices or matters of judgment which turned out to be wrong. Rather, they are just plain mistakes born of inexperience and lack of resources. It does not require hindsight or trial counsel's own testimony to establish that in a capital case, a lawyer should select qualified experts; mental health experts should be instructed to evaluate the defendant for mitigating factors; a lawyer should interview or depose experts--particularly *his own*--before they testify. Failure to investigate a client's mental health condition adequately constitutes deficient performance. *Baxter v. Thomas*, 45 F.3d 1501 (11th Cir. 1995); *Agan v. Singletary*, 12 F.3 1012, 1018 (11th Cir. 1994); *Deaton v. Dugger*, 1993 W.L. 391608*6 (Fla.); *Heiney v. Florida*, 620 So. 2d 171, 173 (1993). As for the failure to provide background information to the mental health experts, two years before the trial of this case, this Court underscored the importance of a defendant's history to the forensic evaluation: "Commentators have pointed out the problems involved with basing psychiatric evaluations exclusively, or almost exclusively, on clinical interviews with the subject involved." *Mason v. State*, 489 So.2d 734, 737 (Fla. 1986). The principal value of Mr. Scott's testimony is simply that he confirmed the obvious--that there was no tactical reason for these plain mistakes.

The state's third complaint is that the circuit court required trial counsel to request specifically that the mental state experts evaluate Mr. Gunsby for organic brain damage. The state cites no

passage in the court's order for this argument and there is none. The court clearly articulated the four deficiencies of Mr. Scott in this area, and nowhere is there any requirement that the trial counsel ask experts to eliminate a specific diagnosis.

The state's final complaint with the circuit court's order is that the court improperly found prejudice. In fact, this Court has repeatedly held that compelling evidence of mental deficiencies is a crucial mitigating factor. *See, e.g., Fitzpatrick v. State*, 527 So.2d 809 (1988). Mr. Scott's trial performance foreclosed Mr. Gunsby from that kind of defense.

If the state's conclusory statements are replaced with a detailed analysis of the evidence, the prejudice resulting from trial counsel's four deficiencies is obvious. Mr. Scott chose a clinical social worker who was not qualified to do psychological testing, much less neuropsychological or neurological testing. Dr. Conley made important errors. He incorrectly diagnosed Mr. Gunsby as a paranoid schizophrenic, and he failed to follow-up on the indications of brain damage that were apparent to him. PCT 657-59. The incorrect orders exacerbated the problem. Dr. Conley testified that he did not need to follow-up on indications of brain damage because his findings already answered the three questions asked of him. He testified under oath that if he would have been asked to evaluate mitigating factors, he would have referred Mr. Gunsby for a neurological examination. PCT 659.

Similarly, Dr. Poetter, who testified at length and quite eloquently at the 3.850 hearing about the significance of the defendant's retardation and how the statutory mitigating circumstances apply, at the time of the original trial "wasn't that familiar with the

statutory requirements." PCT 879. If Dr. Poetter had been ordered from the beginning to evaluate Mr. Gunsby for the presence of mitigating factors and to report on those findings, it is probable that his trial testimony would have been much more similar to his defense oriented testimony at the 3.850 hearing.

The failure to provide background information *did* make a difference. Dr. Poetter's incorrect diagnosis and explanation of anti-social personality disorder was damaging to Mr. Gunsby. Dr. Poetter spoke of a "long history of difficulty adjusting to society", "difficult time getting along with people", "difficult time obeying the laws of society", "difficult time maintaining steady, regular employment, living up to obligations with respect to family and friends". OPT 65. This description sounds precisely like the kind of capital criminal who most ought to be executed, and it certainly was not lost on the jury. Dr. Poetter's diagnosis of anti-social personality disorder was based on the defendant's prior record, his juvenile record, and his long history of drinking. By Dr. Poetter's own admission, he would have understood Mr. Gunsby's difficulty if he been informed of the poverty, abuse, and deprivation of Mr. Gunsby's background, as well as his concern for others. OPT 898-900. Similarly, the Mr. Gunsby's elementary school records, Def.'s Ex. 54, App. at 35, demonstrate his serious mental deficiency at an early age--he repeated the first grade, he received "needs improvement" or "unsatisfactory" for all his grades, and he was recommended for a special class. Surely the very obvious step of obtaining his client's school records and providing them to Dr. Mhatre would have caused Dr. Mhatre to inquire further before providing his crucial and erroneous testimony that the defendant lacked any mental deficiency. OPT 34.

Having gotten the experts off on the wrong foot with the wrong order and hampered their evaluations with lack of background material, Mr. Scott virtually guaranteed an erroneous and ineffectiveness presentation of evidence by, except for one 12 minute phone call with Dr. Conley, a complete lack of contact with the experts. Mr. Scott's failure to fulfill his obligation to investigate his client's mental condition adequately was directly prejudicial to Mr. Gunsby. Minimal consultation with Dr. Mhatre would have changed him from the principal state witness to a strong defense witness - all counsel had to do was inform Mhatre of Poetter's I.Q. test results. Any adequate probing of Dr. Conley's opinions would have elicited the possibility of brain damage and the need for further referral. Calling Dr. Poetter as a defense witness without speaking with him first was disastrous. Mr. Scott was left totally unprepared to respond to Dr. Poetter's testimony on cross examination regarding statutory mitigating circumstances. As demonstrated at the 3.850 hearing, Dr. Poetter had a wealth of information and opinions about the applicability of the statutory mitigating circumstances that were just waiting to be tapped. In short, adequate consultation with these same three experts would have left Mr. Gunsby with a consistent series of opinions about his serious deficiencies and the applicability of mitigating circumstances.

In this case, the Court has a unique insight into how the jury viewed the conflicting and inaccurate testimony presented by the experts at the penalty phase. All of the five mock juries studied by jury expert Steven Penrod gave the mental experts and the mental health mitigating evidence very low ratings. PCT 605-609. The jurors did not find the doctors very credible, and the great majority did not believe the evidence established *any* mental retardation or mental illness. By

contrast, the mock jurors who did believe that the defendant was mentally ill and mentally retarded tended to vote for life rather than death. PCT 609-10. This is exactly what one would expect given the evidence from public opinion polls. For example, in 1986 a public opinion survey indicated that although 84% of Florida's population favored capital punishment, 71% opposed the death penalty for the mentally retarded. *Cohen*, "Exempting the Mentally Retarded From the Death Penalty: A Comment on Florida's Proposed Legislation", 19 F.S.U. Law Review p. 457, 471 (1991) (citing Cambridge Survey Research, Inc., "Attitudes in the state of Florida on the Death Penalty: Public Opinion Survey" 7, 611 1986).

In short, there can be no confidence whatsoever that this jury would have reached the same result after hearing from qualified experts, properly instructed, provided with full background material, and adequately prepared to testify regarding the issues of statutory/nonstatutory mitigating circumstances.[23]

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[23] Although the circuit court made clear that its decision rested solely on the prejudicial impact of trial counsel's deficiencies on the jury, it acknowledged the defense argument that the ineffectiveness at the trial stage prejudiced Mr. Gunsby on appeal. Footnote 10 at pp. 23-24. In *Strickland v. Washington*, 466 U.S. 668, 698, the Supreme Court made clear that the prejudice necessary for a finding of ineffective assistance of counsel can be made if absent the errors, an appellate court which independently reweighs the evidence would have concluded that death was not warranted. Mr. Gunsby's sentence was upheld by this Florida Supreme Court by a vote of 4-3. 574 So.2d 1085 (Fla. 1991). Two of the three dissenters found Mr. Gunsby's case indistinguishable from *Fitzpatrick v. State*, 52 So.2d 809 (Fla. 1988) in that Gunsby's "actions were those of a seriously emotionally disturbed man-child". *Gunsby v. State*, 574 So.2d 1085, 1091 (Fla. 1991), quoting *Fitzpatrick* at 812. The majority, however, distinguished *Fitzpatrick* because in that case "there were no disputes among experts considering the extent of the mental disabilities of the [defendant]." *Id.* at 1090. This Court's view that death is not proportionately warranted where there are serious mental deficiencies was subsequently confirmed in *Knowles v. State*, 632 So.2d 62(Fla. 1993). Thus, even if for some reason a jury rejected Mr. Gunsby's

III. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN PRESENTING MITIGATING EVIDENCE REGARDING MR. GUNSBY'S BACKGROUND.

The circuit court found it unnecessary to reach an important aspect of Mr. Gunsby's claim of ineffective assistance of counsel at the penalty phase hearing. Mr. Gunsby's life has been characterized by deprivation, neglect, abuse, and poverty. The failure of his trial counsel to investigate and present comprehensive evidence about his background magnified the prejudice to Mr. Gunsby resulting from the ineffective assistance of his counsel in presenting evidence of his mental condition to the jury.

Mr. Gunsby produced at his 3.850 hearing abundant evidence to demonstrate ineffective assistance regarding the presentation of mitigating evidence under *Strickland*. Trial counsel devoted a total of 11.9 hours to the penalty phase, failed to interview the seven cousins Mr. Gunsby was raised with or his only natural sibling, and never took the short drive to Jasper to investigate Donald's birth, childhood, or upbringing. Further, counsel never investigated or attempted to obtain school records, failed to interview any of Mr. Gunsby's employers, and made no effort to obtain the medical records of Donald's mother, who was institutionalized and suffered from seizures.

At trial counsel limited the background mitigation testimony to Donald's aunt and two other minor witnesses. Johnnie Mae Gunsby's testimony was extremely abbreviated, and counsel could have extracted far more from the woman who raised his client. Furthermore, a

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mitigating evidence, the kind of consistent, well-prepared testimony that would have resulted from effective assistance of counsel at the penalty phase would have rendered Mr. Gunsby's case indistinguishable from cases like *Fitzpatrick* and *Knowles* and earned him a reversal on appeal.

reasonable attempt to develop mitigation testimony from the defendant's cousins and brother would have painted a dramatic and perhaps much different picture than what the jury heard from the proud matriarch of the family. Trial counsel's performance was deficient.

The second prong of *Strickland* requires a showing that counsel's deficient performance affected the outcome of the trial proceeding. 466 U.S. at 688. The record reflects that a reasonable investigation into the defendant's background would have revealed that his upbringing was riddled with violence, hunger, abuse, ridicule, and neglect, and Donald himself was severely developmentally delayed. The adult men in his life were anything by role models; they were uniformly abusive, heavy drinkers, and philanderers. Donald never matriculated past the third grade and still can barely read or write. He drank very heavily, starting at an early age, and most of his cousins are chemically dependent in one form or another. Finally, the jury never heard that Donald was a hard-worker and was gainfully employed prior to his arrest. Had Mr. Scott gone to Jasper, he could have gathered pertinent and compelling information: Donald's mother was virtually incapacitated by her physical and mental deficiencies; Donald was the product of neighborhood men taking advantage of a retarded woman; Louise Jones suffered seizures while she was pregnant and even dropped him as a baby on at least one occasion; and he was left alone with his retarded mother on so many occasions that there was no way that Donald and his brother could have been properly raised. Added to this already hostile environment was the attitudes of a racist community that testimony revealed resembled a plantation in the 1800s far more than a small town in the 1950s.

Testimony and evidence revealed that Donald was a chronic substance abuser, was retarded, and was consistently abused and neglected both physically and emotionally as a child. All of these non-statutory mitigating factors could establish a reasonable basis to support a life recommendation. *Heiney v. Florida*, 620 So. 2d 171, 173 (Fla. 1993).

All Mr. Scott presented were a few thin, random facts about his client. The 3.850 record shows that a rich, poignant, sympathetic body of evidence was available to him. Donald Gunsby has demonstrated a reasonable probability that Mr. Scott's deficiency and inaction with respect to this evidence, combined with the failure to prepare the mental condition evidence described in the previous section, may have affected his sentence. *See, Hildwin v. Dugger*, 654 So.2d 107 (Fla. 1995)

IV. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO OBJECT TO *WITHERSPOON* ERROR.

The prejudice to Mr. Gunsby at the penalty phase was compounded by another of trial counsel's deficiencies which the circuit court never reached. Mr. Gunsby's trial counsel never objected to the trial court's improper excusal of two prospective *Witherspoon*-scrupled jurors or demanded a meaningful reverse-*Witherspoon* inquiry of the venire. The trial court's constitutionally-deficient voir dire, the error's per se constitutional prejudice and trial counsel's ineffective assistance in failing to (1) preserve this crucial error and (2) demand a meaningful reverse-*Witherspoon* inquiry mandates vacation of the death sentence and, when aggregated with the other errors, a new trial.

A. The Trial Court Violated *Witherspoon*.

This Court, recognizing *Witherspoon*, has explicitly rejected the Gunsby trial court's de minimis questioning to excuse prospective jurors for cause in a death penalty case. *Sanchez-Velasco v. State*, 570 So. 2d 908, 915-16 (Fla. 1990), *cert. denied*, 500 U.S. 929, 111 S. Ct. 2045 (1991). The *Sanchez-Velasco* trial court began voir dire with the following question:

> Q: Do you have any philosophical, moral, religious or conscientious scruples against the infliction of the death penalty in a proper case?

This Court observed that "had the judge eliminated the jurors based on an affirmative answer to the above-quoted question alone, he clearly would have been violating *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770 (1968), ..." *Id.* at 915.[24] *Sanchez-Velasco* held that the trial court properly excused prospective jurors for cause *only* because:

> . . . the judge went on to ask each venireperson who responded affirmatively whether he could put his personal convictions aside and vote to recommend the death penalty where the law requires it. The judge disqualified only those venirepersons who indicated in final inquiry that they could not. *While the initial question was not adequate by itself, it was proper because it was used merely as a screening tool and was followed by extensive inquiry.*

Id. at 915-26 (footnote omitted) (emphasis added).

In contrast with *Sanchez-Velasco*, Gunsby's trial court excused prospective jurors Michael and Durchak after an affirmative answer to one question:

> Q. Given the nature of this case, do any of you feel that it would be better if you did not serve on this particular case?

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[24] *Witherspoon* reasoned that the exclusion of jurors must be strictly limited to those who are "irrevocably committed . . . to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." *Witherspoon*, 391 U.S. at 522, n.21, 88 S. Ct. at 1770, n.21.

OGT 11. Neither the trial court nor Scott asked a single follow-up question.[25] Under *Sanchez-Velasco*, the trial court's for-cause excusal of Durchak and Michael clearly violated *Witherspoon*. *Sanchez-Velasco*, 570 So. 2d at 915.[26]

B. Scott's Failure to Object Was Ineffective Assistance of Counsel.

The 3.850 court should have vacated Gunsby's death sentence because his trial counsel was constitutionally ineffective in failing to object to what *Sanchez-Velasco* described as a clear *Witherspoon* error. Despite 25 years of Supreme Court precedent, and absent any strategic rationale, Scott never objected to the trial court's improper

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[25] The trial court's excusal of Michael and Durchak was only its most egregious *Witherspoon* error. After Michael and Durchak were excused, the trial court excused jurors Cooper, Dix, Rice, Nelson and Howell excused without any in-depth questioning about their death penalty views. OGT 11-13. Once again, Scott never exercised his client's *Witherspoon* rights.

[26] This Court has consistently rejected *Witherspoon* claims where the trial court exercised its discretion after fully exploring the juror's view. *See Castro v. State*, 644 So. 2d 987, 989-90 (Fla. 1994) (upholding trial court's exclusion of potential juror who repeatedly indicated he could not set aside his religious opposition to the death penalty); *Taylor v. State*, 637 So. 2d 30, 32 (Fla. 1994) (upholding exclusion of potential juror after extensive voir dire by defense counsel, the prosecutor and the court); *Randolph v. State*, 562 So. 2d 331 (Fla. 1990) (upholding trial court's exclusion of a prospective juror following extensive voir dire by prosecutor and defense counsel).

In contrast, of course, the *Gunsby* trial court performed none of the voir dire described in *Castro*, *Taylor* and *Randolph* and therefore had no basis to evaluate any *Witherspoon* bias of the prospective jurors.

exclusion of two prospective jurors.[27] The error was both the trial court's and defense counsel's.

C. **Gunsby Suffered *Witherspoon*'s Per Se Prejudice.**

Scott's failure to object to the improper exclusion of Gunsby's "*Witherspoon*-scrupled" jurors caused irreparable prejudice because *Witherspoon* error requires automatic vacation of the death sentence. *Gray v. Mississippi*, 481 U.S. 648, 659, 107 S. Ct. 2045, 2052 (1987) (per se rule "requiring the vacation of a death sentence imposed by a jury from which a potential juror, who has conscientious scruples against the death penalty but who nevertheless under *Witherspoon* is eligible to serve, has been erroneously excluded for cause.").

Under *Gray*, Scott's failure to object to the trial court's *Witherspoon/Sanchez-Velasco* error prejudiced Gunsby. If the trial court had overruled Scott's objection, the *Witherspoon* violation--a per se reversible constitutional error--would have been preserved and Gunsby's death sentence would be automatically vacated. If the trial

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[27] A further example of Scott's ineffective *Witherspoon* assistance was his complete failure to protect Gunsby's constitutional right to a "reverse-*Witherspoon*" or "life qualifying" inquiry recognized by this Court and the Supreme Court. *See Gore v. State*, 475 So. 2d 1205, 1206-08 (Fla. 1985) (". . . the trial court should have allowed [the defendant] to propound questions to the jury as to their bias or prejudice in recommending a life sentence."), *cert. denied*, 475 U.S. 1031 (1986); *Morgan v. Illinois*, 504 U.S. U.S. 719, 733-34, 112 S. Ct. 2222 (1992) (trial court required to allow defense counsel to inquire into prospective jurors' views on capital punishment). *Gore* found the reverse-*Witherspoon* error harmless only because all jurors were ". . . thoroughly questioned in regard to their attitudes toward the death penalty . . ." *Gore*, 475 So.2d at 1207.

Most recently, this Court vacated a death sentence for reverse-*Witherspoon* violations. *Willacy v. State*, 640 So. 2d 1079, 1082 (Fla. 1994) (vacating death sentence for trial court's refusal to allow defense counsel to rehabilitate prospective juror who expressed reservations about death penalty). Scott's failure to request a meaningful inquiry of each prospective juror was ineffective assistance.

court had sustained Scott's objection, what might or might not have happened is irrelevant because *Gray* prohibits this type of endless speculation about what the trial court, the prosecutor, or defense counsel may have done absent the *Witherspoon* error. *Gray*, 481 U.S. at 665, 107 S. Ct. at 2052 ("The nature of the jury selection process defies any attempt to establish that an erroneous *Witherspoon-Witt* exclusion of a juror is harmless").

V. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO OBJECT TO AN UNCONSTITUTIONALLY VAGUE JURY INSTRUCTION ON STATUTORY AGGRAVATING FACTORS.

The jury at Mr. Gunsby's original trial was instructed that it could consider the manner in which the murder was committed to be an aggravating factor if the evidence established that "the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." OPT 150. In 1992 the United States Supreme Court found a similar instruction to be unconstitutionally vague. *Espinosa v. Florida*, 112 S.Ct. 2926 (1992). This Court, following the rationale of *Espinosa*, then held that the *exact* instruction used at Mr. Gunsby's trial was unconstitutional. *Jackson v. State of Florida*, 648 So.2d 85, 87 (Fla. 1994); *See also, Foster v. State*, 654 So.2d 112, 115 (Fla. 1995)(even with an additional paragraph not present in *Jackson*, the CCP instruction used did not adequately explain the difference between the premeditation required to convict the defendant for first degree murder, and the heightened premeditation required for using the CCP aggravator). The failure of Mr. Gunsby's counsel to object to this instruction constituted ineffective assistance of counsel. The circuit court did not address this issue.

The state has argued that Mr. Gunsby's trial counsel could not have anticipated this development, so that his failure to object could not constitute ineffective assistance of counsel. However, in both *Jackson* and *Foster*, the record *was* preserved for appeal by defense counsel through objection. Clearly, enough indication existed that the law would change.[28] By 1988, the time of Mr. Gunsby's trial, it would have been obvious to anyone with even a passing familiarity with this area of law that an objection to the instruction was appropriate. The failure of Mr. Gunsby's counsel to object to this instruction constitutes an independent basis for the circuit court's reversal of Mr. Gunsby's death sentence.

VI. MR. GUNSBY WAS INCOMPETENT TO STAND TRIAL.

At the 3.850 hearing, Mr. Gunsby presented uncontradicted evidence that he was incompetent at the time of trial. In its order of December 20, 1994, the circuit court did not address the competence issue at all. In refusing to vacate Mr. Gunsby's conviction, the circuit court implicitly found him competent. The finding of competence was an abuse of discretion in light of the evidence before it.

The standard for competency at trial is whether the defendant had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he had a rational as well

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[28] Indeed, the United States Supreme Court suggested inherent problems with similar instructions prior to the decision in *Espinosa*. *See, e.g., Godfrey v. Georgia*, 446 U.S. 420 (1980) (rejecting imposition of aggravator instruction which failed to follow the specific statutory language under Georgia law with respect to evidence of aggravated battery or torture); *Maynard v. Cartwright*, 486 U.S. 356 (1988)(rejecting Oklahoma instruction of "especially heinous, atrocious or cruel" as being unconstitutionally vague because it did not adequately inform the jury of the applicable standard, leaving the jury with inappropriate open-ended discretion).

as factual understanding of the proceedings against him. § 916.12(1) Fla. Stat. (1981); *Dusky v. United States*, 362 U.S. 402 (1960).

Of the five mental health experts who examined Mr. Gunsby in 1988, 1993, and 1994, four testified at the 3.850 hearing that he met the *Dusky* standard at the time of the original trial. PCT 644; 816; 956; 1038-39; Def.'s Ex. 41, App. at 32. The fifth expert admitted that Mr. Gunsby would require a lot of special attention from trial counsel. PCT 900. It is apparent from Mr. Scott's testimony and time records that he did not receive that attention. Def.'s Ex. 69, App. at 41. In fact, no one who testified at the 3.850 hearing claimed that Mr. Gunsby was competent and no evidence was presented to prove that he was competent.

In light of the uncontroverted evidence of incompetency presented at the 3.850 hearing, the trial court abused its discretion in implicitly finding Mr. Gunsby competent. The lower court's implicit finding of competence should be reversed and Mr. Gunsby's conviction vacated.

VII. MR. GUNSBY RECEIVED INEFFECTIVE ASSISTANCE OF EXPERTS

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the United States Supreme Court recognized that "when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *Id.* at 80. The court then went on to establish the defendant's right to the assistance of psychological experts when the defendant's mental condition is in question. *Id.* at 83. It is only reasonable that for the right to the assistance of psychological experts to be meaningful, the assistance rendered must be effective and competent. *See, Ford v. Gaither*, 953

F.2d 1296, 1299 (11th Cir. 1992) (Doctor's inability to offer assessment of mental state at time of murder violates *Ake* because *Ake* requires an *appropriate* psychiatric evaluation); *Cowley v. Stricklin*, 929 F.2d 640, 645 (11th Cir. 1991)(Doctor who testified on defendant's behalf free of charge but performed inadequate examination was not a sufficient substitute for the provision of an adequate defense psychiatrist.); *Blake v. Kemp*, 758 F.2d 523, 529-33 (11th Cir.) cert denied, 474 U.S. 998 (1995) (Psychiatric examination which failed to ascertain the relevant mental status of the defendant was insufficient under *Ake*.)

Mr. Gunsby did not receive effective and competent assistance of experts at the penalty phase of his trial. All three experts made important errors. Dr. Mhatre testified that Mr. Gunsby had no mental deficiency. Dr. Conley testified that he suffered from paranoid schizophrenia. Dr. Poetter testified that he had an antisocial personality disorder. The experts admitted that they had made errors or oversights at the time of trial. PCT 650; 657-58; 894. Although the circuit court did not reach this issue, the death penalty should be vacated on this independent basis alone. *State v. Sireci*, 536 So.2d 231, 233 (Fla. 1988)(affirming grant of new sentencing hearing where the trial court found that inadequate psychiatric examinations denied defendant due process.)

VIII. EXECUTION OF A MENTALLY RETARDED INDIVIDUAL CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

The courts of the United States have begun to recognize that "evolving standards of decency that mark the progress of a maturing society" may ultimately lead to a consensus against executing the mentally retarded. *Penry v. Lynaugh*, 492 U.S. 302 (1989). A more

recent dissenting opinion from this Court went even further, holding that the execution of the mentally retarded is prohibited by the Florida Constitution as both cruel and unusual punishment. *Hall v. State*, 614 So.2d 473 (Fla. 1993) *cert. denied*, 114 S.Ct. 109 (1993). Even the majority of this Court has recognized that, at the very least, mental retardation should receive *considerable* weight as a mitigating factor. *Thompson v. State*, 648 So.2d 692, 697 (Fla. 1994), *cert. denied*, 115 S.Ct 2283 (1995).

Perhaps the most telling decision was reached in *Allen v. State of Florida*, 636 So.2d 494 (Fla. 1994). In *Allen*, this Court held that execution of a defendant convicted for a crime committed when he was under the age of 16 violates the prohibition of the Florida Supreme Court against "cruel or unusual" punishment.[29] Allen had "organic brain injury" resulting in an IQ which is actually significantly higher than Mr. Gunsby's.[30] The Court noted a death sentence was unconstitutional because such an extraordinarily small number of defendants under the age of 16 received death sentences.

The dissent in *Hall* explained that this same effect occurs with respect to the mentally retarded -- life trauma associated with severe brain damage usually is a significant enough mitigating factor to outweigh even the most compelling aggravating factors, so that the death penalty is rarely a punishment for the mentally retarded. Under the *Allen* reasoning, this is an independent basis to overturn Mr. Gunsby's sentence of death that the circuit court never reached.

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[29] The Florida State Constitution forbids cruel or unusual punishment in contrast to the United States Constitution's prohibition of cruel and unusual punishment. (8th Amend.)

[30] Allen was 15 years old at the time of the murder. His verbal IQ score was 76 and his full IQ score was 77.

STATEMENT OF FACTS REGARDING THE GUILT/INNOCENCE PHASE

I. EVIDENCE OF *BRADY* VIOLATIONS.

The state failed to disclose information tending to show that Nasser "Tony" Awadallah had incentives to curry favor with the state at two key junctures and had been rewarded through a lenient plea bargain because he was a state's witness in the Gunsby case.

Mr. Awadallah had drug possession charges hanging over his head at the time he first identified Mr. Gunsby as his brother's assailant. In March 1988 he was charged with possession of cocaine and possession of marijuana. Def.'s Ex. 3 He identified the state's principal suspect, Donald Gunsby, on April 21, 1988. Def.'s Ex. 71. The drug charges were not resolved until June 23, 1988. State's Ex. 2 at 1. PCT 35; 39; 147; 150-51; 198; 201.

Prosecutor John Moore was aware during his tenure as lead counsel on the Gunsby case that Mr. Awadallah had drug charges pending at the time he first identified Mr. Gunsby. PCT 147. Information regarding the drug possession charges was sought in a specific request by Mr. Gunsby's trial attorney. Def.'s Ex. 7 at pp. 37-8. During the deposition of investigator Howard Leary, defense counsel Ed Scott specifically asked Leary (with John Moore sitting beside him) whether Mr. Awadallah had ever been arrested for drugs. PCT 119-20; 125-26; 149-150. On August 23, 1988, Judge McNeal ordered the state to produce all "criminal records" of Mr. Awadallah and others. Def.'s Ex. 2. Mr. Awadallah's drug possession charges were not disclosed to any attorney for Mr. Gunsby, whether in response to Judge McNeal's order, questioning in the Leary deposition, or at any other time. PCT 39-40; 119. Mr. Gunsby's trial counsel did not otherwise learn of Mr. Awadallah's drug possession charges. PCT 291-92.

The drug possession charges (and additional charges of burglary and dealing in stolen property committed while Mr. Awadallah was out on bond) were resolved through a highly lenient[31] plea bargain in June 1988. State's Ex. 2. John Moore offered (and Mr. Awadallah's attorney, Ronald Fox, agreed) that adjudication of guilt would be withheld on all four felony charges. Mr. Awadallah was released from jail immediately as a result of the agreement to sentence him to time already served. PCT 201, 361-62.

The terms of the bargain were favorable because Mr. Awadallah was a witness for the state in the Gunsby case. PCT 357-59. At the time of the plea negotiations, Judge McNeal had ensured that Mr. Awadallah would remain in jail until his trial, first by ordering him held without bond and then by reducing the bond only to $100,000, which was "tantamount to no bond for this defendant." PCT 357-58. Mr. Awadallah's attorney then "made it known" to John Moore "that it was known to me that he was an essential witness, an important witness, at least" in the Gunsby case, PCT 358, in an effort to "make the most of my client's status as a witness to John [Moore]." PCT 358-59. Fox was aware that if Mr. Awadallah "would not be adjudicated on a felony, that it would be helpful to the State" by keeping him from "being discredited on the stand." PCT 359. On June 22, 1988, Fox "talked to John Moore and he agreed to withhold adjudication on all the charges,"

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[31] Mr. Awadallah could have received an adjudication of guilt for each of the four felonies for which he was charged, and a "guidelines sentence" of up to one year of incarceration in the Marion County Jail. PCT 363. Under the agreement, however, an adjudication was withheld on each of the four felony charges against Mr. Awadallah. He was sentenced to three years probation, with credit for the 23 days of time served. State's Ex. 2; PCT 362-63. Mr. Awadallah was released the day of the plea. *Id.* As a result of this agreement, Mr. Awadallah "essentially wouldn't have" a criminal record, so long as he led a law-abiding life. PCT 361-62.

with credit for time served. PCT 360; Def.'s Ex. 77, App. at 70. As Fox would testify, "It's a sweet deal." PCT 362.

Neither the terms nor the circumstances of Mr. Awadallah's lenient plea bargain were disclosed to Mr. Gunsby's trial counsel. PCT 120-21; 165. Mr. Gunsby's trial counsel did not otherwise learn of the terms or the circumstances of Mr. Awadallah's plea bargain. PCT 292.

At the moment Mr. Awadallah testified at Mr. Gunsby's trial in November 1988, new charges of burglary and dealing in stolen property were hanging over his head. Specifically, Mr. Awadallah was arrested on October 11, 1988 and charged with burglary and dealing in stolen property. Def.'s Exs. 8, 9, 10; PCT 201-02. The charges were pending at the time of trial; indeed, Mr. Awadallah was incarcerated on those charges and awaiting trial at the time he testified against Mr. Gunsby. *Id.*

Mr. Moore was aware during his tenure as lead counsel on the Gunsby case of the new charges. PCT 152.[32] Mr. Awadallah's October 1988 charges of burglary and dealing in stolen property were never disclosed to any attorney for Mr. Gunsby. PCT 120-21; 152.

Mr. Awadallah was the key eyewitness at trial. PCT 152. When Mr. Awadallah first identified Mr. Gunsby in a line-up, Gunsby was already the state's principal (if not exclusive) suspect, and his picture was the only familiar face included by the state in the line-up. Def.'s Ex.

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[32] As Def.'s Ex. 8 demonstrates and Mr. Moore acknowledged at the 3.850 hearing, he was the intake attorney on Mr. Awadallah's new charges. In an intake report dated October 13, 1988, (less than one month before the Gunsby trial), Mr. Moore stated in the very first sentence that "It should be noted that [sic] the outset of this synopsis that the defendant also goes by the name of Tony and he is on felony probation I believe in front of Judge McNeal *and he is also a state Eye Witness in the First Degree Murder Trial of State of Florida vs. Donald Gunsby which is pending.*" Def.'s Ex. 8 (emphasis added).

71. The leniency reflected in the plea bargain -- an adjudication withheld on all charges as well as no further incarceration -- was a direct result of Mr. Awadallah's status as a witness for the state. PCT 36-37; 42.

Diane Vanessa Williams was arrested for violating the terms of her probation in 1988 before she testified on behalf of the state. State's Ex. 3,4. The state did not disclose that Ms. Williams violated her probation to Mr. Gunsby or any attorney representing Mr. Gunsby. PCT 163; 293-94. Ms. Williams quoted Mr. Gunsby as making statements that could be construed as a kind of confession, in which Mr. Gunsby testified that "he said he had shot Tony." OGT 368.

II. EVIDENCE CONTRADICTING THE TESTIMONY IMPLICATING MR. GUNSBY.

At the original trial, the state established Mr. Gunsby's participation in the crime through the testimony of two eyewitnesses, Tony Awadallah and Opal Latson. In addition, Benny Brown testified concerning an admission made by Mr. Gunsby. Evidence at the 3.850 hearing cast doubt on all three of these sources of identification testimony.

A. Mr. Gunsby's Alleged Admission to Bennie Brown.

Officer Wayne Sellers testified at trial that, on the evening of the shooting, Mohammed Awadallah (the victim's father) and Opal Latson Sellers (an employee of the Big Apple and a key eyewitness at trial) told him that the man who did the shooting was the same man Officer Sellers had brought to the Big Apple earlier in the day in connection with the altercation between Tony Awadallah and Jessie Anderson. OGT 443-44; 447-48; 451; 454-56. That man was Isaac Burgess. *Id.* Isaac Burgess and Bennie Brown were romantically involved at the time of the shooting. OGT 229-30; 216-17.

On the evening of the shooting, Isaac Burgess was interviewed by Ocala police at the home of Bennie Brown and was informed that he was a suspect in the murder of Hesham Awadallah. OGT 217-18; 228-30. Ms. Brown had invited Ocala police officer Wayne Sellers to her home because she had heard rumors that Isaac Burgess was the shooter. OGT 226; 228-31; 444. Ms. Brown told police that evening that her boyfriend, Isaac Burgess, was not the shooter. OGT 228.

Theodore "Uncle Nut" Chavers and James "Hoggie" Colbert were also original suspects in the shooting of Hesham Awadallah. PCT 993-94; 999. Bennie Brown is Colbert's mother and the cousin of Chavers and James "Jap" Anderson and Jesse Anderson (who was knocked down in the original incident at the store). OGT 201; 216; 221; PCT 990.

At Mr. Gunsby's trial, Bennie Brown provided damning testimony that Mr. Gunsby returned to James "Jap" Anderson's party and told Anderson that "he had taken care of that." OGT 227-28. At the 3.850 hearing, Anderson denied that Mr. Gunsby returned to the party and told him that he had "taken care of that" as claimed by Bennie Brown. PCT 217-18. Further, there was also evidence that on the night of the shooting, Donald Gunsby left James "Jap" Anderson's party to go home and babysit. OGT 214-16.

B. Tony Awadallah's Admissions to Lewis Barnes

At the time of the trial, Tony Awadallah was in the Marion County Jail in administrative lock down because he was a "Blood And Body Fluid" risk because of his infection with the HIV virus. PCT 357-58; Def.'s Ex. 91. Lewis Barnes was also incarcerated in the Marion County Jail in administrative lock down during the fall of 1988. PCT 318; 320. Tony Awadallah told Lewis Barnes that he did not see who shot his brother, Hesham Awadallah. PCT 319. Mr. Scott was told of this

admission, but never interviewed Barnes or called him as a witness. PCT 295; 319-20.

C. Hesham Awadallah's Assailants

Although the state at trial presented a theory of a lone gunman, it is an undisputed fact that three people were involved in the shooting of Hesham Awadallah. PCT 195; 206-07; 401-02. Two of the three known eyewitnesses to the shooting, Nassar "Tony" Awadallah and Agnes Delores "Lois" Myers, both testified at the 3.850 hearing that there were three people involved in the shooting. Tony mentioned the same thing in passing at Mr. Gunsby's original trial. OGT 246. The only other known eyewitness, Opal Latson Sellers, did not contradict this fact at the Rule 3.850 hearing, (PCT 220-225) or in her deposition, Def.'s Ex. 97 at 28, or at the original trial. OGT 256-57.

Eyewitness Myers testified that the three individuals involved in the shooting all wore pantyhose masks over their heads. PCT 403; 405. The other two eyewitnesses, Tony Awadallah and Opal Latson Sellers, both denied that the gunman wore a mask. PCT 197-98; 220. However, Ms. Sellers' testimony is directly contradicted by her former husband, Alvin Latson, who testified that Ms. Sellers told him that three men were involved in the shooting (PCT 229-31), and that two of the men, including the actual gunman, wore "pantyhose" masks over their heads. PCT 230-31. Tony Awadallah's testimony is contradicted by the testimony of Lewis Barnes. PCT 319.

Two of the three people involved in the shooting have been identified as Theodore "Uncle Nut" Chavers and James "Hoggie" Colbert, both of whom were originally suspects in the murder of Hesham Awadallah. PCT 403-05; 993-94; 999. Lois Myers testified that she recognized two of the three assailants as Chavers and Colbert. PCT

403. The state offered absolutely no testimony contrary to Ms. Myers' testimony that Chavers was involved in the shooting or disputing that Chavers and Colbert both were originally suspects in the murder. The only disputed fact is whether Colbert was one of the participants in the shooting. Mr. Colbert, obviously unwilling to incriminate himself in the murder, understandably testified that he was not. PCT 1006-07. Ms. Myers' testimony about Chavers and Colbert should be credited because it precisely parallels the state's belief that both Chavers and Colbert were suspects.

D. Opal Latson Sellers' Identification of Mr. Gunsby

Opal Latson Sellers testified at Mr. Gunsby's trial that Mr. Gunsby shot Hesham Awadallah and that she saw his face. OGT 256; 258. However, at the 3.850 hearing it was established that on the evening of the shooting, Ms. Sellers discussed the shooting with her then-husband Alvin Latson and told him that there were three men involved in the shooting and that she did *not* see the face of the man who shot Hesham Awadallah because he was wearing a "pantyhose" mask over his face. PCT 229-31. Ms. Sellers denied this statement, (PCT 220) but for the reasons discussed in Section IIIA below, Mr. Latson's testimony is far more credible than the testimony of Ms. Sellers. Further undermining Ms. Sellers' credibility, Ms. Sellers and James "Hoggie" Colbert were romantically involved at or near the time of the shooting and before Ms. Sellers testified against Mr. Gunsby. PCT 1005-06; Def.'s Ex. 99, App. at 72.

E. Tony Awadallah's Identification of Mr. Gunsby

Tony Awadallah testified at Mr. Gunsby's trial that Mr.Gunsby shot Hesham Awadallah. OGT 239-40. Mr. Awadallah told the police that by the time he looked up, the gunman had already shot his brother and that

he saw "a little" of his face. OGT 246-49. However, at the 3.850 hearing it was revealed that two days after the shooting, Mr. Awadallah asked Agnes Bryant Myers, the mother of Lois Myers, if she knew who shot his brother. PCT 246. Further, as set forth above, Mr. Awadallah told Lewis Barnes that he did not see the gunman's face. PCT 319; 1021-22.

F. The eyewitnesses' concern about their safety even after Mr. Gunsby was incarcerated

On April 21, 1988, Tony Awadallah and Opal Latson Sellers both identified Donald Gunsby from a photo line-up as the man who shot Hesham Awadallah. PCT 198; 224; Def.'s Exs. 71 and 89. However, at the 3.850 hearing it was established that both witnesses continued to fear for their safety, presumably because one or more of the assailants were still at large. On April 24, 1988, Mr. Awadallah, because he still felt threatened, borrowed a machine gun from Alvin Latson, Ms. Sellers' then-husband, for protection. PCT 199; 232-33. Ms. Sellers was with Tony Awadallah when he borrowed the machine gun from Mr. Latson, on April 24, 1988. PCT 199; 232-33. Although Ms. Sellers now denies any involvement in the machine gun transaction, both of the other participants in this transaction, Mr. Awadallah and Mr. Latson, testified that she participated. Contrast PCT 220-21 with PCT 199-200 and PCT 232-33. Thus, the state's only two eyewitnesses directly contradict each other on a key matter related to the certainty of their identification of Mr. Gunsby.

Mr. Awadallah did not return home after identifying Mr. Gunsby as the gunman. Instead, he was taken by police to a local motel where he spent several days. PCT 200; Def.'s Ex. 81, App. at 71. On April 24, 1988, while staying at the Travelodge Motel, Mr. Awadallah summoned

police to his motel room because he was afraid someone was trying to break into his room. Def.'s Ex. 81, App. at 71. On May 24, 1988, Mr. Awadallah was involved in an altercation with several men who beat him with a baseball bat. PCT 200-01; Def.'s Ex. 79.

Finally, eyewitness Lois Myers did not come forward with information about the three gunmen summarized above for many years after the shooting because she had been threatened on a number of occasions and was afraid of recriminations against herself and her family, even though Mr. Gunsby had been incarcerated since shortly after the shooting. PCT 416-21; 427.

Significantly, James "Hoggie" Colbert and Theodore "Uncle Nut" Chavers were both incarcerated when Lois Myers finally decided to come forward and tell what she knew about the shooting. *See* Exhibits 1, 5, 58 and 59 to Mr. Gunsby's 3.850 petition. PCR 569, 581, 1116, and 1134.

G. James "Hoggie" Colbert's false testimony

James "Hoggie" Colbert corroborated the identification of Mr. Gunsby at the original trial by testifying that on the evening of the shooting he saw Mr. Gunsby wearing "green army pants." OGT 195-96; 204. Mr. Colbert admitted during the 3.850 hearing that he testified falsely against Mr. Gunsby. PCT 992-93. Mr. Colbert never saw Mr. Gunsby wearing anything other than a colorful Hawaiian shirt and shorts on the day of the shooting. PCT 992-93.

SUMMARY OF ARGUMENT REGARDING THE GUILT/INNOCENCE PHASE

Mr. Gunsby has appealed the circuit court's denial of his motion for a new guilt/innocence trial. The circuit court correctly found that the State violated Mr. Gunsby's rights under *Brady v. Maryland* by withholding evidence directly undermining the credibility of key state

witnesses Tony Awadallah and Diane Williams.[33] However, in deciding whether those *Brady* violations were sufficiently material to require a new trial, the circuit court applied the wrong standard for materiality. When the standard for materiality as set forth in recent Supreme Court caselaw is properly applied, Mr. Gunsby's entitlement to a new trial becomes apparent.

The circuit court failed to address other important grounds raised by Mr. Gunsby for a new guilt/innocence trial. Evidence was presented at the 3.850 hearing that trial counsel unreasonably failed to interview two obvious witnesses with helpful information, James Anderson and Lewis Barnes. Moreover, newly discovered evidence presented for the first time at the 3.850 hearing destroyed the credibility of Opal Latson, the second eyewitness whose reliability was a significant factor in the circuit court's finding that the *Brady* violations were not material. Even if the Court should find each of these individual errors insufficient to warrant a new guilt/innocence trial, the combination of all of them clearly warrants such relief.

ARGUMENT REGARDING THE GUILT/INNOCENCE PHASE

I. THE CIRCUIT COURT ERRED IN FAILING TO ORDER A NEW TRIAL DESPITE THE STATE'S REPEATED FAILURES TO DISCLOSE *BRADY* INFORMATION.

The Circuit Court acknowledged that the materiality of the various *Brady* violations was "a very close question and one on which this court deliberated over for quite some time." In several instances during the evidentiary hearing, the trial court acknowledged the importance of the witnesses whose credibility was undermined by the information withheld.

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[33] *See* Order, App. at 8: "The State concedes that withholding Mr. Awadallah's criminal history is a *Brady* violation. The State further concedes that withholding Ms. Williams' criminal charge may well be another violation. This court finds that they both constitute *Brady* violations."

Tony Awadallah was presented by the state as an eyewitness to the killing capable of identifying without equivocation his brother's assailant. Diane Vanessa Williams was presented by the state as an objective bystander who overheard Mr. Gunsby inculpate himself in the crime. Nevertheless, the state contended that such violations constituted harmless errors (Order, App. at 9).

After describing the state's argument "that the defendant has failed to establish that the outcome of the trial would have been different" if the information had been disclosed, the circuit court held that it was "persuaded by this argument and finds that even if the information had been disclosed to the defense, the outcome would probably not have been different." *Id.*

A. <u>The Circuit Court framed the issue of materiality incorrectly</u>

The state has always acknowledged that *Brady* violations are material if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. See *United States v. Bagley,* 473 U.S. 667, 682 (1985)(opinion of Blackmun, J.); *Id.* at 685 (White, J., concurring in part and concurring in the judgment); *Breedlove v. State,* 580 So. 2d 605, 607 (Fla. 1991). This term, in *Kyles v. Whitley,* --- U.S. ---, 115 S. Ct. 1555 (1995), the U.S. Supreme Court emphasized four components to the proper application of that test in post-conviction review cases:

> Four aspects of materiality under *Bagley* bear emphasis. Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, ***a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal*** (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not

inculpate the defendant).[citations omitted].[34] *Bagley's* touchstone of materiality is a "reasonable probability" of a different result, ***and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence,*** but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines the confidence in the outcome of the trial." *Bagley,* 473 U.S. at 678.

The second aspect of *Bagley* materiality bearing emphasis here is that it is not a sufficiency of the evidence test. ***A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.*** . . .

Third, we note that, contrary to the assumption made by the Court of Appeals, 5 F.3d, at 818, once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review. . . . In sum, once there has been *Bagley* error as claimed in this case, it cannot subsequently be found harmless under *Brecht [v. Abrahamson,* 507 U.S. ---, 113 S. Ct. 1710, 1712 (1993)][footnote omitted].

The fourth and final aspect of *Bagley* materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item-by-item. [footnote omitted]. . . . the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached.

Kyles, 115 S. Ct. at 1565-67(emphasis added).

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[34] [*Bagley*], at 682 (opinion of Blackmun, J.)(adopting formulation announced in *Strickland v. Washington,* 466 U.S. 668, 694 (1984); *supra,* at 685 (White, J., concurring in part and concurring in judgment)(same); *see Id.* at 680 (opinion of Blackmun, J.)(*Agurs* "rejected a standard that would require the defendant to demonstrate that the evidence if disclosed probably would have resulted in acquittal"); *cf. Strickland, supra,* at 693 ("[W]e believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case"); *Nix v. Whiteside,* 475 U.S. 157, 175 (1986)("[A] defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland.*").

Two aspects of the circuit court's decision show that the court required more than a "*reasonable* probability of a different result" as *Kyles* requires:

- After noting that "The State contends that the defendant has failed to establish that the outcome of the trial *would have been different* even if the criminal history of Mr. Awadallah and Ms. Williams had been properly disclosed to the defense," (Decision at 9)(emphasis added), the circuit court stated that "This court is persuaded by this argument . . . ." *Id.*

- The court found "that even if the information had been disclosed to the defense, the outcome *would probably not* have been different." *Id.* (emphasis added).

In this manner, the circuit court did what the Supreme Court held courts should not do: it effectively asked whether the defendant more likely than not would have received a different verdict with the evidence. *Contrast Kyles,* 115 S. Ct. at 1566 ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."). It effectively substituted an outcome-determinative test that the Supreme Court explicitly rejected in *Strickland,* the decision upon which *Bagley* is based:

> This test is not outcome-determinative. An individual need not show that the [error] more likely than not altered the outcome of the case. The result of the proceeding can be rendered unreliable, and hence the proceeding unfair, even if the [suppression of the evidence] cannot be shown by a preponderance of the evidence to have determined the outcome.

Strickland, 466 U.S. at 693-94; *accord Lockhart v. Fretwell,* U.S. 113 S. Ct. 838, 842 (1993)(the essence of the inquiry considers whether the error caused the verdict to be unreliable or the proceedings unfair rather than "mere outcome determination.")

Under *Bagley* and *Kyles*, the circuit court was required to "assess the possibility that [an adverse] effect might have occurred in light of the totality of the circumstances," paying due respect to the "difficulty" of speculating how the trial would have evolved absent suppression. *Bagley*, 473 U.S. at 683. In other words, the circuit court was required to approach this problem not as if it is deciding between guilt and innocence, but whether the defendant deserves the opportunity to have guilt and innocence decided at a trial untainted by constitutional violations. The circuit court in this case, however, essentially asked whether there was enough evidence left to convict, which the *Kyles* court also found was improper. (Order, App. at 9: "The State points to the fact that there were two eyewitnesses who positively identified the defendant in a lineup the day after the murder and at trial. The State also points to the fact that there were two other witnesses besides Ms. Williams who overheard the defendant make admissions concerning his commission of the murder and that each of these witnesses is independent of each other. This court is persuaded by this argument . . . .") The only proper setting in which those questions could be resolved is a constitutional trial untainted by the *Brady* violations.

B. The Circuit Court erred in affirming the conviction after finding that the question of materiality was "a very close question."

Even with Mr. Gunsby held to an unduly rigorous standard for establishing materiality, the court concluded that "This is a very close question and one which this court deliberated over for quite some time." (Order, App. at 9). Where repeated *Brady* violations cause a court to find "a very close question" regarding whether "the outcome would probably not have been different," as the circuit court held in

this case, those violations necessarily undermine confidence in the outcome of the trial. Because *Bagley* and its progeny require a new trial under those circumstances, the Circuit Court erred by permitting the conviction to stand.

The U.S. Supreme Court's first decision this term involving this issue demonstrates why a new trial was warranted in this case. In *O'Neal v. McAninch*, -- U.S. ---, 115 S. Ct. 992 (1995), the Supreme Court decided "whether a federal habeas court should consider a trial error harmless when the court (1) reviews a state-court judgment from a criminal trial, (2) finds a constitutional error, and (3) is in *grave doubt* about whether or not that error is harmless." *Id.* at 994 in original). The Supreme Court held that "when reviewing errors from a criminal proceeding, this Court has consistently held that, if the harmlessness of the error is in grave doubt, relief must be granted. We hold the same here." *Id.* at 996.

While attempting to avoid the language of burdens of proof, the Supreme Court in *O'Neal* confirmed that the risk of non-persuasion regarding harmlessness is on the State. *Id.*(Noting previous decisions that had "resolved the issue now before us in the same way, placing the risk of doubt on the State.") Reversal is warranted in such circumstances, the Supreme Court explained, in light of the "basic purposes underlying the writ of habeas corpus":

> As we have said, we are dealing here with an error of constitutional dimension -- the sort that risks an unreliable trial outcome and the consequent conviction of an innocent person. See *Brecht*, 507 U.S. at ___ (slip op. at 2-5)(O'Connor, J., dissenting). ***We are also assuming that the judge's conscientious answer to the question, "But, did that error have a 'substantial and injurious effect of influence on the jury's decision?" is, "It is extremely difficult to say." In such circumstances, a legal rule requiring issuance of the writ will, at least often, avoid a grievous wrong -- holding a person "in custody in***

> ***violation of the Constitution . . . of the United States."*** 28 U.S.C. §§ 2241(c)(3), 2254(a). Such a rule thereby both protects individuals from unconstitutional convictions and helps to guarantee the integrity of the criminal process by assuring that trials are fundamentally fair. See [Chief Justice R.] Traynor, [The Riddle of Harmless Error] 23 [(1970)]("In the long run, there would be a closer guard against error at the trial, if . . . courts were alert to reverse, in case of doubt, for error that could have contaminated the judgment.")

O'Neal, 115 S. Ct. at 997 (emphasis added).

While the circuit court in this case did not employ the phrase "grave doubt," its analysis embodies the same degree of uncertainty regarding the impact of the *Brady* violations. Most notably, the circuit court found materiality was a "very close question" after agreeing with the notion that "the defendant failed to establish that the outcome of the trial *would have been different*" even if the information improperly withheld had been disclosed. (*Id.*). Whatever difference may exist between "grave doubt" and "a very close question" would evaporate had the circuit court asked about reasonable probabilities of a different outcome, rather than a different outcome. The circuit court would either have been in the same kind of equipoise as in *O'Neal*, or would have reached the firm conclusion that the *Brady* violations were material. In either event, the necessary result would have been a new trial regarding Mr. Gunsby's guilt or innocence.

C. Applying the Correct Standard, the *Brady* Violations were Material.

The Supreme Court decision in *Kyles* also demonstrates how an appellate court should respond when a trial court imposes too heavy a burden regarding materiality upon the petitioner. Rather than remanding the case to the District Court to apply the proper standard, the Supreme Court appropriately addressed the issue of materiality and held that "disclosure of the suppressed evidence to competent counsel

would have made a different result reasonably probable." *Kyles,* 115 S. Ct. at 1569.

The *Kyles* decision also resolved any doubt about whether a court may evaluate materiality on a piecemeal basis, asking whether each particular *Brady* violation -- by itself -- is sufficiently material to warrant a new trial. The Fifth Circuit was reversed because its logic reflected that kind of hyperanalysis, rather than viewing the cumulative effect of all of the *Brady* violations:

> There is room to debate whether the two judges in the majority in the Court of Appeals made an assessment of the cumulative effect of the evidence. Although the majority's *Brady* discussion concludes with the statement that the court was not persuaded of the reasonable probability that Kyles would have obtained a favorable verdict if the jury had been "exposed to any or all of the undisclosed materials," 5 F.3d at 817, the opinion contains repeated references dismissing particular items of evidence as immaterial and so suggesting that cumulative materiality was not the touchstone. [citations omitted] The result reached by the Fifth Circuit majority is compatible with a series of independent materiality evaluations, **rather than the cumulative evaluation required by *Bagley,*** as the ensuing discussion will show.

Id. (emphasis added). Thus, at a minimum, this court must ask whether disclosure of *all* of the wrongfully suppressed evidence to competent counsel would have made a different result reasonably probable.

In this case, the State withheld evidence showing that two of its most important witnesses had incentives to curry favor with the State through their assistance or testimony in the Gunsby trial. It knowingly withheld information tending to show that Tony Awadallah had incentives to curry favor with the State at two key junctures, and had been rewarded through a favorable plea bargain because he was a State's witness in the Gunsby case. As the circuit court noted in its decision, "Despite [a court order requiring disclosure] and the inquiries made by Mr. Gunsby's attorney, the State failed to reveal the

drug charges, the lenient plea agreement, and the new charges which were pending against Mr. Awadallah at the time of the Gunsby trial." (Order, App. at 8).

Even if the individual pieces of withheld evidence regarding Mr. Awadallah were not material and favorable to Mr. Gunsby, the combined effect - - initial charges resolved with great leniency as the result of testimony favorable to the State, followed by subsequent charges pending while he testified before the jury -- makes it highly material and favorable when viewed as a whole, as *Kyles* requires. A reasonable jury could have concluded from the sequence of events reflected in the three pieces of withheld information that Mr. Awadallah expected to be rewarded by the state for assisting in the case against Mr. Gunsby by testifying against him at trial. His status as a witness for the State, resulting from his identification of Gunsby with charges pending, resulted in a highly favorable disposition of those charges, thereby establishing an expectation in his mind that subsequent charges -- such as those pending at the time of trial -- would be favorably resolved as well if he continued to testify favorably for the state.

The jury's view of Mr. Awadallah would have been far different if he had been cross-examined with these three related pieces of information. They provided a clear explanation to the jury for the change in Mr. Awadallah's story. Without that explanation, Mr. Scott's cross-examination of Mr. Awadallah was empty of meaning. The jury could have understood that Mr. Awadallah said different things at different times, but had little basis on which to decide which of the two variations was worthy of belief. With the benefit of the *Brady* information, the jury could more easily have seen the differences in

identification as the product of extraordinary incentives to help the State, rather than an innocent mistake or choice of words.

Mr. Awadallah was "one of the State's key eyewitnesses" -- as the circuit court itself recognized at the time of the evidentiary hearing and again in its Decision. (Order, App. at 6). Mr. Awadallah "identified the defendant as the person who shot and killed his brother." *Id.* As a result, evidence tending to impeach him is especially likely to undermine confidence in the outcome. As the Supreme Court noted in *Kyles* -- in evaluating the significance of a *nontestifying* eyewitness to the crime -- "the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others, as we have said before." *Kyles,* 115 S. Ct. at ____. *Accord Bartholomew v. Wood,* 34 F.3d 870, 874 (9th Cir. 1994), *petition for cert. filed,* 63 U.S.L.W. 3644 (U.S. Feb. 14, 1995) (No. 94-1419). ("*Brady* information includes material that bears on the credibility of a significant witness in the case")(quoting with approval from *United States v. Strifler,* 851 F.2d 1197, 1201 (9th Cir. 1988), *cert. denied,* 489 U.S. 1032 (1989)). For example, former boxing champion Rubin "Hurricane" Carter successfully petitioned for federal habeas corpus based on the failure to disclose evidence that cast doubt on the credibility of a key prosecution witness. *See Carter v. Rafferty,* 826 F.2d 1299, 1309 (3rd Cir. 1987), *cert. denied,* 484 U.S. 1011 (1988).

The presence of a second purported eyewitness -- Opal Latson -- does not restore "confidence" in the outcome. In *Lindsey v. King,* 769 F.2d 1034, 1042-43 (5th Cir. 1985), the Fifth Circuit held that the failure to disclose evidence impeaching one of the two eyewitnesses caused sufficient prejudice to undermine confidence in the outcome of

the trial, even though the other witnesses' testimony supported the verdict by itself. The Fifth Circuit's eloquent explanation is particularly appropriate here:

> [O]ur experience at the bar has been that positive identification by two unshaken witnesses possesses many times the power of such an identification by one only, and that the destruction by cross-examination of the credibility of one of two crucial eyewitnesses -- even if the other remains untouched -- may have consequences for the case extending far beyond the discrediting of his own testimony.

Lindsey, 769 F.2d at 1042.

The State used Diane Vanessa Williams to testify that Mr. Gunsby incriminated himself, while withholding evidence of her incentives to curry favor with the State. Specifically, the State did not disclose that Williams had been picked up for violating her probation once it became known that she might have information regarding the Gunsby case; that she was held without a hearing and without bond for 2½ weeks; that she then pleaded guilty, was released and then and only then gave favorable testimony to the State, by testifying that "he said he had shot Tony." OGT 368.[35] At a minimum, the jury was entitled to evaluate this testimony with knowledge of her probation violation and the circumstances surrounding it, so that they could draw their own conclusions regarding her motivations.

In deciding whether a new trial is warranted, the Justices of the Court "cannot and should not attempt to retry the case in [their] imaginations." *Lindsey, Id:*

> Whether it is reasonably probable that a different result might have obtained had the evidence been disclosed is a question of agonizing closeness. This is a capital case,

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[35] The status of a state's witness as a probation violator is a "proto-typical form of witness bias." *U.S. v. Simmons*, 964 F.2d 763, 770 (8th Cir. 1992); *U.S. v. Burnside*, 824 F.Supp. 1215 (N.D. Ill. 1993).

> however, and one moreover in which our reading of the evidence shows there is a real possibility that the wrong man is to be executed. In such a case, if ever, petitioner should receive the benefit of the doubt.

Lindsey, 769 F.2d at 1043.

D. <u>In the Alternative, the Effect of All Information Improperly Withheld When Viewed in the Context of the Expanded Record of the Evidentiary Hearing, Mandates a New Trial</u>.

Even if the *Brady* violations are not sufficient to satisfy the materiality requirement, reversal is warranted in light of the expanded record made available to the circuit court at the 3.850 hearing. At that hearing the credibility of the other eyewitness, Opal Latson, and the principal "earwitness," Benny Brown, were devastated. Implicit in the right to an evidentiary hearing on Mr. Gunsby's *Brady* claim is the relevance of evidence presented at the hearing. If the only evidence significant to an assessment of materiality were evidence before the original jury, plus the *Brady* evidence, then there would be no reason to require an evidentiary hearing in cases of this kind. Yet the right to such a hearing is so well-established that even the state acknowledged the need for such a hearing in this case. As the state acknowledged in its arguments to the circuit court when discussing the *Brady* materiality test, "In making a determination of whether or not this standard had been reached, the Court should consider the credibility of the witnesses who testify at the evidentiary hearing, *Kight v. Dugger,* 574 So.2d 1066 (Fla. 1990), as well as the context of the entire record." (State's Post-Hearing Brief at 7). PCR 2961. There is more than a reasonable probability that Mr. Gunsby would have been acquitted if the evidence available to the circuit court in the evidentiary hearing in 1994 had been presented to the jury in 1988.

II. THE CIRCUIT COURT ERRED IN FAILING TO ORDER A NEW TRIAL BECAUSE MR. GUNSBY'S TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN INVESTIGATING AND PRESENTING EVIDENCE

Applying the *Strickland* criteria, the record in this case overwhelmingly demonstrates that Mr. Gunsby's defense counsel was ineffective in investigating and presenting evidence at the guilt/innocence phase of the trial.

A. The Failure of Mr. Scott to Interview and/or Depose James "Jap" Anderson Was Deficient and Prejudicial.

The record in this case reflects that Mr. Scott did not notice or take the deposition of James "Jap" Anderson. Yet Anderson testified at the 3.850 hearing that Mr. Gunsby never returned to the party and never made the statement attributed to him by Bennie Brown that, "He had taken care of that." PCT 217-18. According to Anderson, Mr. Gunsby left the party to go home and babysit. PCT 214-15. Further, Anderson testified that Bennie Brown has a reputation in the community for being a liar. PCT 215-16.

Bennie Brown's testimony that Gunsby told Anderson that he had "taken care of that" was very damaging. Mr. Scott took Brown's deposition and learned that Mr. Gunsby had allegedly made this statement *to Anderson*. Yet, he did absolutely nothing with that critical piece of information. A logical step for any diligent counsel would have been to verify through Anderson whether the statement was made -- particularly given Bennie Brown's motive to incriminate Mr. Gunsby; i.e., to protect her lover, her son, and her cousin. As the Eleventh Circuit has said, "While we do not require that a lawyer be a private investigator in order to discern every possible avenue which may hurt or help the client, we do require that the lawyer make an

effort to investigate the obvious." *House v. Balkcan*, 725 F.2d 608, 617 (11th Cir.) *cert denied*, 469 U.S. 870 (1984).

The failure of Mr. Scott to depose Anderson and present Anderson as a witness at trial was prejudicial. Anderson's testimony would have discredited Bennie Brown, and the principal corroboration of the two eyewitnesses would have been badly damaged. Lacking any physical evidence tying Mr. Gunsby to the murder and given the notorious inaccuracy of eyewitnesses to traumatic events, the state badly needed that corroboration.

B. <u>The Failure of Mr. Scott to Interview and/or Present Lewis Barnes as a Witness at Trial Was Deficient and Prejudicial</u>.

Mr. Barnes testified at the 3.850 hearing that he informed Mr. Gunsby of his conversation with Tony Awadallah. PCT 319. Mr. Barnes also testified that Mr. Scott never contacted him. *Id.* Mr. Scott admitted that he knew during the pretrial investigation that Barnes had information relevant to Mr. Gunsby's defense but he chose not to interview him because he personally did not find Mr. Barnes to be credible. PCT 295; 330.

Mr. Scott's personal belief that Mr. Barnes was not a credible witness was no excuse for failing at least to meet with and discuss evidence with a potential witness who would directly impeach eyewitness testimony implicating his client. The failure of Mr. Scott to investigate the circumstances surrounding Mr. Barnes' conversation with Mr. Awadallah was outside the broad range of reasonably competent performance under prevailing professional standards. It was also prejudicial. Given the corroboration provided by Mr. Awadallah's "lock down" status and the other evidence impeaching Mr. Awadallah's identification, Mr. Barnes' testimony as reflected in the 3.850 hearing

record, was very helpful to Mr. Gunsby. Ironically, the state was unable to challenge Mr. Barnes' credibility because he was a key prosecution witness in a murder case. PCT 322-23; 325.

III. THE CIRCUIT COURT ERRED IN FAILING TO ORDER A NEW TRIAL BECAUSE OF NEWLY-DISCOVERED EVIDENCE

The standard for granting relief based on newly discovered evidence requires that "[T]he asserted facts must have been unknown by the trial court, by the party, or the counsel at the time of the trial, and it must appear that the defendant or his counsel could not have known them by the use of diligence." *Jones v. State*, 591 So.2d 911, 916 (Fla. 1991). The newly discovered evidence "must be of such a nature that it would *probably* produce an acquittal on retrial." *Id.* at 915 (emphasis in original). The testimony of Alvin Latson, Agnes Delores "Lois" Myers, Agnes Bryant Myers and James Colbert at the 3.850 hearing constitutes newly discovered evidence. As explained below, this newly-discovered evidence in this case would unquestionably "probably produce an acquittal on retrial." *Id.*

A. The Testimony of Alvin Latson is Newly-Discovered Evidence.

At the time Mr. Gunsby filed his 3.850 petition, his counsel were relying principally on the record developed by defense counsel at trial. At that time, Ms. Sellers refused to speak with Mr. Gunsby's representatives. Based on that record, Mr. Gunsby asserted that trial counsel, Edward Scott, was ineffective for not discovering and deposing Alvin Latson prior to trial. He was certainly deficient: in his deposition of Ms. Sellers, Mr. Scott failed to even ask if she was married or whom else she had spoken to about the shooting. However, since that time Ms. Sellers has been deposed in preparation for the 3.850 hearing. During her deposition, Ms. Sellers denied ever speaking

with Alvin Latson about the shooting. Def.'s Ex. 97 at 76. She also denied speaking with Alvin during her 3.850 hearing testimony. PCT 220. Presumably she would have said the same thing in 1988 even if Mr. Scott had conducted a competent deposition. Consequently, Mr. Scott would have had no opportunity to discover and depose Mr. Latson because Ms. Sellers would have denied any discussion with Mr. Latson, and Mr. Scott would have had no reason to speak with him. After all, Mr. Latson and Ms. Sellers were separated at the time of the shooting, and he left town a few days later. PCT 233; 235. Therefore, Alvin Latson's testimony constitutes newly discovered evidence which trial counsel could not have discovered with the exercise of reasonable diligence prior to trial.

The significance of Alvin Latson's newly discovered testimony is obvious. Mr. Gunsby's conviction was based largely upon the testimony of only two eyewitnesses, Tony Awadallah and Opal Latson Sellers. Alvin Latson's testimony that his wife told him that she could not see who shot Hesham Awadallah because the shooter was wearing a mask is devastating impeachment. PCT 229-30; 234. Even a lawyer one year out of law school could have effectively cross-examined and cast doubt upon Opal Latson Seller's identification of Mr. Gunsby by bringing this prior inconsistent statement to the attention of the jury.

It is true that Ms. Sellers denies the conversation with Mr. Latson. However, Mr. Latson's testimony is far more credible than Ms. Sellers. First, Mr. Latson has no motive to fabricate the details of the conversation between himself and Ms. Sellers on the evening of the shooting. By contrast, Ms. Latson, whose boyfriend James "Hoggie" Colbert was originally a prime suspect in the murder, had a very powerful motive to lie -- to protect her lover. Second, the statements

made by Ms. Sellers to Alvin Latson were so close in time to the actual shooting that they were made under the stress of the event when they were fresh in her memory. Third, the specifics of her statement are corroborated in almost every detail by other eyewitnesses to the event -- *i.e.*, Tony Awadallah *and* Lois Myers say three individuals were involved in the shooting, and Ms. Myers also described the assailants as wearing pantyhose masks. Fourth, the details of the statement could only have come from Ms. Sellers, because Mr. Latson left town and had no other connection to the shooting. The only other person who knew about the masks was Lois Myers, who kept silent for years out of fear for her life and had a connection to Mr. Latson anyway. Fifth, the prosecution unsuccessfully tried to impeach Mr. Latson's testimony by suggesting that he and his wife were in the middle of a hotly contested custody dispute when Ms. Sellers made the statement. PCT 236-37. Mr. Latson denied the state's suggestion that there was a custody dispute, which was thereafter substantiated by introduction of the couple's divorce file. Def.'s Ex. 100. The file indicates that Mr. Latson did not contest custody. The information about an alleged custody dispute could have only come from Ms. Sellers and is yet another example of her lying to bolster her own credibility.

Further, the state also tried unsuccessfully to impeach Mr. Latson about his testimony that Ms. Sellers, and none other than James "Hoggie" Colbert, her admitted boyfriend, threatened Mr. Latson's life. The state tried to suggest, without support, that the event never occurred. PCT 240. Once again, Mr. Latson's version of the facts was substantiated in every respect by the subsequent introduction of the police report he filed after the incident. Def.'s Ex. 99, App. at 72. Finally, Ms. Sellers has demonstrated that she is not worthy of belief

by lying on at least two occasions while under oath -- *i.e.*, Ms. Sellers denied being present when Tony Awadallah borrowed a machine gun from Alvin Latson, (PCT 220-21), although *both* Mr. Awadallah and Mr. Latson testified that she was there. PCT 199; 232-33. Ms. Sellers again testified falsely during her 3.850 deposition about her termination from the Ocala Housing Authority for theft. Def.'s Ex. 97; Def.'s Exs. 101, App. at 82; Def.'s Ex. 102. On April 14, 1994, the state disclosed that at the time of Ms. Sellers' 3.850 deposition she was under criminal investigation for stealing money from her employer, the Ocala Housing Authority. Def.'s Ex. 101, App. at 82. The documents provided by the state demonstrate that Ms. Sellers had been terminated by the Ocala Housing Authority as a result of their investigation into her theft. *Id.* However, when asked point blank in her deposition why she left the Ocala Housing Authority Ms. Sellers lied and said it was to work more in her family business. Def.'s Ex. 97. She made absolutely no mention of the fact that she had been fired for theft even though the question asked was designed to elicit such a disclosure. The fact that Ms. Sellers was under investigation for theft and her willingness to lie about it demonstrate that she had reason to curry favor with the state and stick with her trial testimony even in the face of flat contradictions from Mr. Latson and Mr. Awadallah.

Alvin Latson's newly discovered testimony about the activities of Ms. Sellers and Mr. Awadallah after the shooting is also significant. The record reveals that both Mr. Awadallah and Ms. Sellers identified the defendant as the gunman on April 21, 1988, the day after the shooting occurred. PCT 198; 224; Def.'s Ex. 71 and 89. It is undisputed that Mr. Gunsby was arrested on April 21, 1988, based on

their identification.[36] Mr. Latson's testimony that Ms. Sellers and Mr. Awadallah came to him on April 24, 1988, several days after the shooting, to borrow Mr. Latson's machine gun, PCT 199; 232-33, establishes that neither Ms. Sellers nor Mr. Awadallah were confident in their identification of Mr. Gunsby as the gunman. This testimony is even more significant because Ms. Sellers denied the whole episode, suggesting she recognized that it contradicted her positive identification.[37]

Finally, Mr. Colbert was romantically involved with eyewitness Ms. Sellers at or near the time of the shooting and before Mr. Gunsby's trial. This fact, along with the evidence offered by Mr. Latson regarding Ms. Sellers' inability to identify the gunman and Mr. Colbert's status as a suspect in the shooting, impeaches both Ms. Sellers and Mr. Colbert by showing their motive to testify falsely against Mr. Gunsby, i.e. to keep Mr. Colbert out of jail.

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[36] The Arrest Affidavit/First Appearance Form, which is part of the record in this case, states that Mr. Gunsby was arrested at the Ocala Police Department at 4:15 p.m. on April 21, 1988. Def.'s Ex. 38.

[37] The significance of Tony Awadallah borrowing a machine gun from Alvin Latson must be considered in the context of *Brady* evidence which also showed that Mr. Awadallah feared for his safety. The state failed to disclose that Mr. Awadallah called the police to his hiding place three days after Mr. Gunsby's arrest because he feared for his safety. The state also failed to disclose to the defense that, one month after Mr. Gunsby was incarcerated, Mr. Awadallah -- intended victim of the Big Apple shooting -- was the subject of a violent beating. (Exs. 79 and 79; Investigative leads dated May 23-4, 1988, 1-3; Ex. 18: Edward L. Scott Affidavit 3: ¶ 3.) Together with this evidence withheld by the state, Alvin Latson's testimony makes clear that Mr. Awadallah continued to fear for his safety -- and to take elaborate steps to protect himself (including borrowing a machine gun) -- long after the alleged gunman, Mr. Gunsby, was incarcerated.

B. **The Testimony of Agnes Delores "Lois" Myers is Newly Discovered Evidence.**

The testimony of Lois Myers could not have been discovered by Mr. Scott with the exercise of due diligence. Ms. Myers testified that she did not come forward and tell any of the individuals investigating the shooting of Hesham Awadallah the truth regarding what she knew about the shooting. Ms. Myers' testified that she was afraid to come forward and tell what she knew because she feared retaliation against herself and her family. Before giving her testimony for the 3.850 hearing, Ms. Myers had previously given *two* sworn statements to the state in which she failed to disclose what she really knew about the shooting. State's Ex. 15. There is no reason to conclude that, had Mr. Scott deposed Ms. Myers before the trial, she would have told him the truth. It was not until after Mr. James "Hoggie" Colbert and Mr. Theodore "Uncle Nut" Chavers were in prison that Ms. Myers first came forward.

The importance of Ms. Myer's testimony cannot be denied. Ms. Myer's testimony cast serious doubt on the testimony of both identification witnesses against Mr. Gunsby, Ms. Sellers and Mr. Awadallah: They could not have seen the gunman's face, because the gunman who shot Hesham Awadallah wore a mask. Ms. Myer's testimony is corroborated by Alvin Latson's testimony that on the evening of the shooting, Ms. Sellers, his then-wife, also told him that the gunman who shot Hesham Awadallah was wearing a mask. Ms. Myer's testimony, had it been available at trial, especially in conjunction with Mr. Latson's testimony, would have devastated the state's two star identification witnesses.

Further, Ms. Myers' testimony directly implicates both Theodore "Uncle Nut" Chavers and James "Hoggie" Colbert in the murder. As discussed above, both Uncle Nut and Hoggie were originally suspects in the murder.

C. The Testimony of Agnes Bryant Myers is Newly Discovered Evidence.

The testimony of Agnes Bryant Myers could not have been discovered by trial counsel by the exercise of due diligence. There is absolutely nothing in the record developed by the police or counsel during the investigation of the shooting that would suggest Ms. Myers as a witness. It was fortuitous that Mr. Gunsby's present counsel discovered Ms. Myers' knowledge while attempting to locate Ms. Myers' daughter, Agnes Delores "Lois" Myers, during their investigation.

The significance of Agnes Bryant Myers' testimony is clear. Just as Alvin Latson's testimony constitutes devastating impeachment of the eyewitness identification made by Opal Latson Sellers, Agnes Bryant Myers' newly discovered testimony impeaches the eyewitness identification by Tony Awadallah. The fact that two days after the shooting Agnes Myers was asked by Tony Awadallah if she knew who shot his brother, casts serious doubt upon Tony Awadallah's identification of Mr. Gunsby the day before.

D. The Testimony of James "Hoggie" Colbert is Newly Discovered Evidence.

Mr. Colbert admitted that he testified falsely against Mr. Gunsby at trial. Therefore, Mr. Colbert's truthful account could not have been discovered with the exercise of due diligence.

The importance of Mr. Colbert's testimony is threefold. First, he testified falsely at trial that he saw Mr. Gunsby on the night of

the shooting wearing green army pants, the same type of clothing allegedly worn by the gunman. OGT 195-96; 204; PCT 992-93. Second, his 3.850 hearing testimony that Mr. Gunsby was wearing a colorful Hawaiian shirt and shorts is consistent with an alibi witness who testified for Mr. Gunsby. PCT 992-93; OGT 411. Finally, his status as a police suspect directly corroborates Lois Myers' testimony that he was one of the people involved in the shooting and gives Bennie Brown, his mother, and Opal Sellers, his girlfriend, a powerful motive to testify falsely against Mr. Gunsby.

E. The totality of the newly discovered evidence outlined above probably would produce an acquittal.

As stated above, Mr. Gunsby's conviction was based largely upon eyewitness testimony from Tony Awadallah and Opal Latson Sellers. No physical evidence linked Mr. Gunsby to this murder. No murder weapon was produced at trial, much less any fingerprints or other physical evidence of the killer's identity. Given the lack of any physical evidence linking Mr. Gunsby to the crime, the newly discovered evidence which undermines the eyewitnesses' purported identification of Mr. Gunsby as the shooter clearly is evidence which probably would result in a different verdict upon retrial.

IV. MR. GUNSBY IS ENTITLED TO A NEW GUILT/INNOCENCE TRIAL BECAUSE OF THE COMBINED EFFECT OF BRADY VIOLATIONS, INEFFECTIVE ASSISTANCE OF COUNSEL, AND NEWLY DISCOVERED EVIDENCE

Mr. Gunsby is entitled to a new trial for each of three independent reasons: (1) the state's failure to disclose the evidence impeaching Tony Awadallah and Vanessa Williams, (2) trial counsel's errors in failing to contradict Bennie Brown's testimony with readily available testimony from James Anderson and failing to use Lewis Barnes to impeach Mr. Awadallah's identification, and (3) the newly discovered

evidence from Alvin Latson and Lois Myers contradicting Mr. Awadallah's and especially Opal Latson Sellers' identification of Mr. Gunsby and establishing their continued fear even after Mr. Gunsby was arrested. Moreover, this Court has recognized that multiple *Witherspoon* errors may taint both the sentence and the underlying conviction. *O'Connell v. State*, 480 So.2d 1284 (Fla. 1985). However, even if for some reason this Court determines that a new guilt/innocence is not warranted on any of these grounds independently, taken collectively they demonstrate that Mr. Gunsby's trial was fundamentally unfair. There is much more than a reasonable probability that the outcome of the 1988 trial would have been different if a properly constituted jury had heard the evidence produced at the 1994 3.850 hearing.

Florida's appellate court's have traditionally considered the cumulative effective of multiple errors in determining whether a new trial is warranted. *See, Amos v. State*, 618 So.2nd 157, 161 (Fla. 1993) ("While each of these points individually might be found to be harmless under the harmless error rule, we are unable to hold that they constitute harmless error when taken collectively.") Florida appellate courts have considered the cumulative effect of multiple errors even if those errors involved different types of violations. *See, Nowitzke v. State*, 572 So.2d 1346 (Fla. 1990); *Carter v. State*, 332 So.2d 120 (D.C.A. Fla. 1976). This principle extends to the aggregation of constitutional and non-constitutional error. *See, Hargrove v. State*, 530 So.2d 441, 443 (Fla. App. 4th Dist. 1988).[38] The Supreme Court has

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[38] Although Florida appellate courts have not addressed the question, courts in other states have aggregated the prejudice from *Brady* violations together with other prejudicial errors. *See People v. LaDolce*, 607 N.Y.S. 2d 523 (N.Y. App. Civ. 1994)(new trial required because of cumulative effect of numerous errors, including prosecutor's comments about defendant's failure to testify,

recognized a similar cumulative error analysis. *Taylor v. Kentucky*, 436 U.S. 478, 487 & n. 15, 98 S.Ct. 1930, 1936 & n. 15 (1978) (cumulative effect of "potentially dangerous circumstances" including prosecutor's closing argument and trial court's "skeletal" instructions combined with error of failing to instruct on the presumption of innocence, violated the due process guaranty of fundamental fairness). The federal circuit courts follow the same procedure. *See, United States v. McLain*, 823 F.2d 1457, 1462 (11th Cir. 1987) ("We find that the prosecutor's misconduct did not permeate the entire atmosphere of the trial. Instead, it was the *cumulative effect* of the errors committed by the judge and the prosecutors that denied the defendants a fair trial".)(Emphasis in original.); *United States v. Parker*, 997 F.2d 219, 221 (6th Cir. 1993); *United States v. Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993). The collective consideration of grounds for a new trial is also appropriate in a post-conviction proceeding. *See, Derden v. McNeel*, 978 F.2d 1453, 1456 (5th Cir. 1992) ("With one exception. . . our sister circuits have held in *dicta* that federal habeas relief may issue if the defendant was denied Fourteenth Amendment due process by a cumulative effect of errors committed in a

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prosecutor's comments regarding function of grand jury, failure to disclose agreement with chief witness in violation of *Brady*, and defective jury instructions); *Frank v. Commonwealth*, 842 S.W.2d 476 (Kan. 1992)(even if *Brady* error, inappropriate admission of gruesome photographs, and introduction of evidence of a prior offense were not independently prejudicial, "the cumulative effect of the prejudice from all three would certainly" require a new trial). *See, also, State v. Johnson*, 816 P.2d 364 (Id. Ct. App. 1991)(defendant entitled to withdraw his guilty plea because of cumulative effect of *Brady* violation, wrong advice on maximum possible penalty, and judicial error in determining motivation for withdrawal of plea); *People v. Pizzali*, 552 N.Y.S. 961 (N.Y. App. Div. 1990)(cumulative effect of *Brady* violation, invalid jury instruction, and reading back of testimony to jury in the absence of defendant's translator, required dismissal of indictment without prejudice).

state trial, which together deny fundamental fairness."); *United States ex rel. Sullivan v. Cuyler*, 631 F.2d 14, 17 (3rd Cir. 1980)("Moreover, unified consideration of the claims in the petition well satisfies the interests of justice because the cumulative effect of the alleged errors may violate due process, requiring the grant of a writ, whereas any one alleged error considered alone may be deemed harmless.")

The circuit court erred in failing to assess the significance of the state's *Brady* violations in light of the other evidence produced at the 3.850 hearing. The court stated that it found the *Brady* violations with respect to Tony Awadallah and Vanessa Williams immaterial because it was persuaded by the state's argument that there was another eyewitness and two other witnesses to admissions by Mr. Gunsby. (Order, App. at p. 9). However, the circuit court failed even to mention that the credibility of the other eyewitness, Opal Latson Seller, had been undermined by the newly discovered contradictory testimony of her husband, Alvin Latson, produced at 3.850 hearing. Likewise, the circuit court did not address the independent testimony of Lois Myers that the shooter wore a mask. Similarly, the court failed to consider that reasonably competent counsel could have directly undermined the testimony of one of the other two witnesses to admissions by Mr. Gunsby, Benny Brown, by calling to the stand James Anderson, as was done at the 3.850 hearing.[39]

Even in analyzing the state's *Brady* violations in isolation, the circuit court found the question of a new trial to be "very close". Presumably by that phrase the court meant that it would not have taken

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[39] The third witness to admissions by Mr. Gunsby, Al Hart, was already directly contradicted at trial by the testimony of former state attorney Raymond Taylor. OGT 389-92.

much more evidence damaging to the state's case to tip the balance toward reversal. At the very least, the testimony of Alvin Latson, Lois Myers and James Anderson is entitled to some weight. Had the court considered this evidence properly in conducting a cumulative error analysis, the balance would have been tipped the other way. Mr. Gunsby is entitled to a new guilt/innocence phase because his 1988 trial was fundamentally unfair in that it did not include important evidence withheld by the state, evidence that should have been produced by his lawyer, and evidence that has been recently discovered.

CONCLUSION

Donald Gunsby's 1988 trial was a sad and sorry basis for condemning a man. His trial counsel was one year out of law school, failed to interview obvious witnesses, and barely prepared the penalty phase at all. The trial court improperly excused two jurors. The prosecution repeatedly failed to disclose exculpatory information and misrepresented Mr. Gunsby's prior record to the jury. Every one of the three mental health experts who testified made important errors. Evidence discovered since the trial cast the identification evidence against Mr. Gunsby in an entirely new light. Mr. Gunsby is brain damaged and retarded and appears to have been incompetent at the time of the original trial, which may partly explain why so many deficiencies went unprotested. If due process and fundamental fairness have any real meaning in our criminal justice system, the only thing to do with this case is to start over. Mr. Gunsby's conviction should be vacated and a new trial ordered.

Dated this 26 day of July, 1995.

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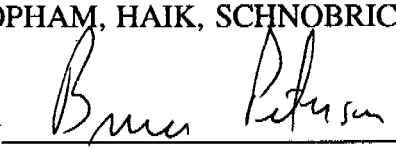
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellee/Cross-Appellant has been furnished by Federal Express on this 26th day of July, 1995, to Kenneth S. Nunnelley, Esq., Assistant Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, FL 32118.

Dated this 26th day of July, 1995.

POPHAM, HAIK, SCHNOBRICH & KAUFMAN, LTD.

By 

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